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No. 80-617

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

Elaine Jean Stemple, et. al.,

Petitioner

v.

Board of Education of Prince George's County, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Donald N. Bersoff
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301/ 528-5619

Attorney for Petitioner

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QUESTION PRESENTED

Where 20 U.S.C. § 1415(e)(3) of the Education for All Handicapped Children Act bars only those changes in educational placement made during the pendency of proceedings under the statute, does appellate court's construction of that provision requiring that the status quo be maintained as soon as school authorities identify, evaluate, or place handicapped children deny such children and their parents substantive and procedural rights otherwise guaranteed by the Act?

TABLE OF PARTIES

Petitioner

Elaine Jean Stemple, by her father and next friend, Rosswell C. Stemple.

Respondents

Prince George's County

Board of Education of Prince George's County

Norman H. Saunders
A. James Golato
Lesley Kreimer
Sue V. Mills
Maureen K. Steinecke
Chester E. Whiting
Susan B. Bieniasz
Jo Ann T. Bell
Bonnie F. Johns
Christine A. Dant,

Individually and as members of the Board of Education of Prince George's County.

State of Maryland

State Board of Education of the State of Maryland,

Richard Schifter
William Sykes
Mary Elizabeth Ellis
William M. Goldborough
Joanna T. Goldsmith
Albertine Thomas Lancaster
Lawrence A. Miller
Charles E. Thompson
G. George Ashke,

Individually and as members of the State Board of Education of the State of Maryland.

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JURISDICTION

The judgment of the Court of Appeals was rendered on May 27, 1980. On June 10, 1980 the Petitioner requested that the court rehear the case en banc. The court amended its decision to correct a factual error but denied the petition for rehearing on August 18, 1980. See Appendix B, pp. 25a-27a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 615(e)(3) of the Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(3) (1976) [hereinafter EAHCA]. [redacted] The specific provision at issue states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.
>
> 20 U.S.C. § 1415(e)(3).

The implementing regulation promulgated by the Department of Health, Education, and Welfare, Bureau of Education for the Handicapped (now Office of Special

Education and Rehabilitative Services of the Department of Education [OSERS, ED) states:

> During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.
>
> 45 C.F.R. § 121a.513(a) (1978).

STATEMENT OF THE CASE

This case began over four years ago on June 18, 1976, when Elaine Stemple [hereinafter Petitioner or Elaine], by her father Rosswell Stemple, asked the Prince George's County Board of Education [hereinafter Respondent] for tuition reimbursement for expenses incurred as a result of Elaine's placement at a private school because her parents believed that the Respondent did not offer their daughter an appropriate education.

Petitioner is an multihandicapped adolescent girl with a long history of physical and emotional disabilities. By the time Elaine began first grade Respondent and her parents had recognized that she needed special educational training. She had intermittent hearing loss, poor gross and fine muscle

coordination, inarticulate speech, and emotional problems, all of which affected her scholastic functioning. As a result, she received reading and speech therapy and individualized teaching throughout most of her school years.

Petitioner attended Respondent's Suitland Elementary school from the first through third grades. At Suitland, it was determined that she needed special education placement and was placed in similar programs when she was transferred to Brooks Elementary School for one year and then transferred to William Bean Elementary School the next year. In January 1976, while Elaine was attending William Bean, Respondent removed her from the small self-contained special program and placed her in a pool of thirty children as part of an open space regular classroom with three other

classes of the same size. In other words, she was placed in a large room consisting of four classes with a total of 120 children. In addition, she received some remedial help.

By May 1976, Elaine's parents concluded that she was not progressing scholastically or emotionally and that the "mainstreaming" experiment that the school had imposed was a failure. This lack of progress was a continuation of educational problems that had been noted for three years, e.g., by the time she was in the sixth grade and eleven years old, she was reading on the second grade level despite the fact that the school considered her to be of average intelligence. The parents communicated their concerns to Respondent about their daughter's absence of educational development during the entire period. It

was only then, after several years of good faith and trust in the public school, that the Petitioner's parents removed her from the Respondent's school system in May 1976 and placed her in the Leary School, a private nonresidential school for handicapped children. Petitioner remained at Leary throughout that summer and the following two school years, 1976-1977 and 1977-1978.

At Leary, Elaine received intensive individualized training and showed great improvement in her reading, writing, and speech skills. She improved in other academic areas as well. It was evident that the self-contained small class program established for her was successful. Nevertheless, in September, 1978, her parents withdrew her from the Leary School because of financial hardships created by tuition payments.

Petitioner presently attends the Respondent's schools. Her parents agreed to placement after lengthy but cooperative negotiations with Respondent that resulted in an appropriate, mutually satisfactory program for Elaine.

Elaine's father's request for tuition reimbursement on June 1976 was denied. He petitioned, in timely fashion, for a formal hearing to adjudicate the claim that Respondent had established an inappropriate educational program as a result of its inadequate assessment of Elaine's handicapping tions. On August 1977 the local hearing officer ruled against her. See Appendix E, pp. 58a-67a. Petitioner then appealed to the Maryland State Department of Education Hearing Review Board [hereinafter the Board]. By this time, the

request for review covered May 1976 to August 1978. The Board, on February 23, 1978, affirmed the local hearing officer's decision. See Appendix D, pp. 51a-57a. It determined that Petitioner, not Respondent, had the burden of proving the inadequacy of her placement and that she did not meet the burden. Petitioner filed a request for judicial review with the federal court in the District of Maryland pursuant to 20 U.S.C. § 1415(e)(2)(4) and 29 U.S.C. § 794 (§504 of the Rehabilitation Act of 1973) and implementing regulation 45 C.F.R. § 84.36.

In Petitioner's complaint she asked the district court for a substantive review of the findings of the Board and to rule on two procedural matters--the allocation of burden of proof in special educations hearings to parents and the

introduction of evidence by the Maryland State Department of Education [hereinafter the State] at the Board hearing in violation of 45 C.F.R. § 121a.508(3). In response, both Respondent and the State, moved to dismiss the action.

The district court granted the motion to dismiss, ruling that:

1. 20 U.S.C. § 1415 was not applicable since it did not become effective until October 1, 1977 and the administrative proceedings challenging the Respondent's conduct began prior to that date, thus providing no basis for granting substantive review.

2. Allocation of the persuasion burden was properly on parents as 29 U.S.C. § 794 does not afford parents the right to place that burden on school officials and that allocation to parents was not a

violation of due process.

3. There was no need to reach the merits of procedural irregularity concerning the introduction of evidence at the State Board proceeding as any claim against the State would ultimately result in the award of retroactive money damages from the State to Petitioner and thus was barred by the eleventh amendment to the U. S. Constitution.

Petitioner appealed what she considered to be three clearly erroneous rulings to the fourth circuit.[1] On May

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[1] In her brief to the fourth circuit, Petitioner argued that:

a. EAHCA was applicable to this case as the request for judicial review occurred after the effective date of its jurisdictional provision and that even if it should be decided that there would have been retroactive application, the district court failed to apply the test for retroactivity under Bradley v. Sch. Bd. of City of Richmond, 416 U.S. 696 (1974).

27, 1980, the court of appeals affirmed the district court's dismissal of the case but did not reach any of Petitioner's contentions. Rather, it decided the case on grounds that were never at issue in the case on appeal nor in the district court. The appeals panel held that under the language of 20 U.S.C. § 1415(e)(3), Elaine had no right to reimbursement in any event. It construed that provision, which requires parents to keep their handicapped children in their then current educational placement

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[1] b. The persuasion burden, under both the United States and Maryland Constitutions properly belongs on the school system, as is practice in other States.

c. Her claims should not have been barred by the eleventh amendment as they were against the county, not the State, school system and counties enjoy no sovereign immunity either under state law or Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

during the pendency of administrative and judicial proceedings, so as to create a duty on the part of parents to maintain the status quo as soon as school authorities make a decision as to identification, evaluation, and placement of a handicapped child. Further, the appellate court held that the obligation continues until a decision not to contest is reached or, if a contest ensues, until that contest is finally determined. In her request for a rehearing en banc Petitioner asserted that the fourth circuit's interpretation was based on the application of incorrect legal principles and a misapprehension of material facts that were so fundamental as to create substantial and manifest injustice to the rights of handicapped children and their parents. On August 18, 1980, the court denied the

request for rehearing. It is from the original holding that Petitioner requests review.

REASON FOR GRANTING THE WRIT OF CERTIORARI

The fourth circuit court of appeals has, in this case, decided a new important question of federal law never before considered by the Supreme Court. In fact, this Court has never been asked to construe any provision of the EACHA, 20 U.S.C. §§ 1401-1461. The decision below is not only completely contrary to the plain meaning of 20 U.S.C. § 1415(e)(3), and to the intent of Congress, but also to interpretations of that section by four federal district courts in the second, fifth, eighth and District of Columbia circuits as well as interpretations by the administrative agency delegated the responsibility by

Congress for implementing the EAHCA. Of paramount importance is the fact that the lower court has decided the question in such a way as to effectively abrogate the substantive and procedural rights of a great number of handicapped children that Congress otherwise granted in the law in question.

The EAHCA is a remedial statute of national application in which Congress gave full recognition to the right of more than eight million handicapped children to an education appropriate for their unique needs. In Congress' view, the special education needs of handicapped children were not being met despite the fact that instructional techniques were advancing to the point that they could be met. It also found that state and local educational agencies have a responsibility to

provide for the educational needs of handicapped children but that inadequate financial resources prevented full realization of this responsibility. Congress concluded, therefore, that it was in the national interest for the federal government to assure that educational needs of handicapped children would be met by providing monetary assistance to state and local agencies. See 20 U.S.C.A. § 1401, Historical Note; Pub. L. 94-142 § 3 (1975).

Essentially, then, Congress' purpose in passing the EACHA was to:

> assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist

> States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children. Pub. L. 94-142 § 3(c).

As the appellate court recognized, the EAHCA's major purpose is to maximize the education of handicapped children. Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 896 (4th Cir. 1980). The state's primary benefit from participation is financial assistance to help them achieve Congress' intent. Monahan v. State of Nebraska, 491 F. Supp. 1074, 1080 (D. Neb. 1980), appeal docketed, No. 80-1436 (8th Cir. June 4, 1980). Congress evidenced its strong commitment to the goal of the Act by increasing its financial appropriation to the states each year. The federal appropriation for FY 1977 was

$315 million, for FY 1978 $465 million,[2] for FY 1979 $804 million, and for FY 1980 $874.5 million. In FY 1981, Congress will appropriate approximately $922 million.[3]

The states' receipt of these funds is contingent on the submission of annual program plans which reflect the obligation of state and local education agencies to fulfill the purposes of the Act. 20 U.S.C. §§ 1412, 1413. Once states receive federal financial assistance under the EAHCA (and all do with the exception of New Mexico), they promise parents and their handicapped children access to a number of rights. Primary among these are the right to a free, appropriate education, parental

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[2] DHEW, Progress Toward a Free Appropriate Public Education 109 (1979).

[3] ED, Congressional Budget Justification 149 (1980).

participation in the writing of individual education plans designed to meet the unique needs of each handicapped child, and the right of each child to be properly and comprehensively evaluated by a multidisciplinary diagnostic team.

To insure that these, and other rights, are actually granted, the statute and their implementing regulations, see 45 C.F.R. § 121a.1-.754 (1978), contain a series of provisions which created procedural mechanisms for challenging the failure of school systems to properly identify, evaluate, place, or provide free appropriate education to handicapped children. '20 U.S.C. § 1415(b)(1)(E); 45 C.F.R. §§ 121a.504(a), 121a.506(a); Monahan v. State of Nebraska, 491 F. Supp. 1074, 1085 (D. Neb. 1980). ("One of the Act's goals in providing procedural safeguards

is to insure that a child is not placed in an inappropriate educational placement. . ."). These procedural safeguards include the right of parents to:

1. Examine their children's education records. 20 U.S.C. §1415(b)(1)(A); 45 C.F.R. § 121a.502.

2. Obtain an independent educational evaluation. 20 U.S.C. § 1415(b)(1)(A); 45 C.F.R. § 121a.503.

3. Consent to preplacement psycho-educational evalutions and to initial placement in special education programs. 20 U.S.C. § 1415(b)(1)(C)(D); 45 C.F.R. § 121a.504.

4. An impartial hearing during which parents and the school system may present oral and written evidence, confront and cross-examine witnesses, be represented by counsel, and obtain a written decision

from the hearing officer. 20 U.S.C. § 1415(d); 45 C.F.R. § 121a.509.

5. Appeal for review of the local hearing officer's decision by the state education agency. 20 U.S.C. § 1415(c)(d); 45 C.F.R. § 121a.509.

6. Judicial review in either federal or state court. 20 U.S.C. § 1415(e)(2); 45 C.F.R. § 121a.511.

All of these substantive and procedural rights granted by Congress are essentially extinguished in the case of the Petitioner and all those similarly situated given the appellate court's construction of 20 U.S.C. §1415(e)(3). Petitioner believes that this construction, therefore, presents an important and substantial federal question about which there is conflict between the fourth circuit and the federal district courts in four other

circuits. Left standing, the decision creates a rule that is directly inimical to Congress' purpose in enacting the EAHCA to the detriment of the civil rights of significant numbers of handicapped children and their parents. In support of this contention we make two assertions:[4]

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[4] In her petition for rehearing, Petitioner also argued that the fourth circuit's opinion, as applied in her case, was a fundamental denial of due process. While a subsidiary issue in this petition for a writ of certiorari the contention is worth discussing briefly.

The fourth circuit's decision severely undermined the basic due process principle of notice. E.g., Vitek v. Jones, 100 S.Ct. 1254, 1264-1265 (1980). Under Maryland rules in force at the time, the local school system was required to notify parents of any actions it proposed to take with respect to their handicapped children, to state the basis for these proposals, to inform parents of their right to be heard concerning the contemplated action, and to describe the procedure for requesting such a hearing "including an explanation that such a hearing may be requested at any time

I. .The court's opinion violates the plain meaning of 20 U.S.C. § 1415(e)(3).

II. The court's opinion violates the intent and express purpose of the EAHCA.

We discuss each of these points in turn.

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4 prior to the end of the school year. . . ." Md. Bylaw 13.04.01.21.(B)(3)(d) (1975) (emphasis added). There is no argument that Petitioner's parents complied with this provision. Their only duty was to file a request for a hearing to contest the school's action prior to the end of the school year 1976. This they did and in doing so dutifully followed bylaws duly promulgated by the Maryland State Department of Education. For an appellate court to create a new duty, unsupported by the text of the EACHA was to violate the very essence of the due process clause of the fourteenth amendment. The fourth circuit has, in effect, fabricated an ex post facto rule in 1980 precluding the vindication of substantive and procedural rights to which Plaintiff was clearly entitled under a valid and existing law in 1976.

I. THE COURT'S OPINION VIOLATES THE PLAIN MEANING OF 20 U.S.C. § 1415(e)(3).

Although opting for a literal interpretation of the section in question, Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 897 (1980), the appellate court created a "duty to preserve the status quo," id. at 898, out of whole cloth that is not only contrary to the plain meaning of 20 U.S.C. § 1415(e)(3), but to all prior cases involving tuition reimbursement and to interpretations by the administrative agency delegated the responsibility for implementing and enforcing the EACHA.

Under the Act the obligation to preserve the status quo is triggered only "during the pendency of any proceedings conducted pursuant to this section. . . ." 20 U.S.C. § 1415(e)(3). The "proceedings" referred to are limited to

those specified--impartial due process hearings conducted by the local education agency, appeal and review by the state educational agency, and civil action in any appropriate state or federal district court. 20 U.S.C. § 1415(b)(2), (c), (d), (e)(1)(2). An administrative or judicial proceeding commences only when a parent files a complaint challenging identification, evaluation, placement, or the provision of a free appropriate education.[5] Until that time the school is deemed only to have proposed (or refused to initiate) a change in one or more of these four areas, classified under the Act as

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[5] In accord is 45 C.F.R. § 84.36, an implementing regulation, 29 U.S.C. § 794, which incorporates the procedural safeguards under the EAHCA. Under that provision, procedural safeguards are defined as notice, opportunity to examine records, an impartial hearing, and a review process.

"matters," not proceedings. 45 C.F.R. § 121a.506(a); see also 121a.504(a)(1), (2); Monahan v. State of Nebraska, 491 F. Supp. 1074, 1089, 1090 (D. Neb. 1980); see Stuart v. Nappi, 443 F. Supp. 1235, 1241 (D. Conn. 1978).

Thus, as in this case, the Respondent's removal of the Petitioner from a small special education program to an open space classroom, despite the fact that she was multiply handicapped, was a "matter," about which the parents had the right to complain within the context of an impartial hearing. It was not a proceeding either as reflected in 20 U.S.C. § 1415 or under applicable regulations, i.e., 45 C.F.R. §§ 121a.506-121a.511. Maryland law defines a proceeding as one in which there is the conduct of "juridical business before a court or judicial officer. . . ."

Estep v. State, 14 Md.App. 53, 64, 286 A.2d 187, 193 (1972); see Erwin v. United States, 37 F. 470, 488 (S.D. Ga. 1889). In like manner, an administrative proceeding would be one before a duly appointed hearing officer or administrative law judge.

If Congress had intended to impose a restriction comparable to the one created by the fourth circuit one assumes that it would have done so explicitly, in a manner exemplified by the New York legislature. In its statute concerning appeals procedures when handicapped children contest school districts' proposals, New York has decreed:

> During the pendency of any proceedings conducted pursuant to this section and during the initial identification, evaluation, and placement procedure pursuant to this section and during the initial identification, evaluation and placement procedure pursuant to Section Forty-four hundred

> two of this article, unless the commissioner [of education for New York] or local school district and the parents or legal guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . . (emphasis added).
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> N.Y. Educ. Law § 4404.4 (McKinney 1978).

Further, the EAHCA clearly contemplates that procedural safeguards will be afforded parents who place their children in private schools and request reimbursement. An implementing regulation to the Act concerning private schools entitled "Placement of Children by Parents" states: "Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500-121a.514. . . ." 45

C.F.R. § 121a.403(b). This regulation does not limit access to impartial hearings only to those cases in which parents, to the perceived detriment of their child, maintain that child in an inappropriate public school program for what may be a term of years while they exhaust all their administrative and judicial remedies.[6]

Decisions in federal courts in the District of Columbia, New York, Texas, and Nebraska unequivocally indicate that tuition reimbursement is a proper remedy under the EAHCA even though parents withdraw their handicapped children prior to the initiation of hearings under 20 U.S.C. § 1415. Capello v. D.C. Bd. of Educ., No. 79-1006 (D.

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[6] Maryland law also recognizes that reimbursement, as well as payment, may be necessary. Md. Educ. Code Ann. § 8-409(c).

D.C., decided Jan. 23, 1980), reported at 3 EHLR 551:500[7] (D. D.C. January 23, 1980) appeal dismissed (D.C. Cir., June 11, 1980); Frankel v. Comm'r. of Educ., 480 F. Supp. 1156, 1160 (S.D. N.Y. 1979); Howard S. v. Friendswood Ind. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978); Monahan v. State of Nebraska, 491 F.Supp. 1074 (D. Neb. 1980).

In Capello, parents of a mentally retarded and emotionally disturbed youth sought tuition reimbursement for their child's education in a private out-of-state residential facility from the local board of education. Shortly after they filed the action in federal district court under the EAHCA and § 504 but before the court heard the case, the

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[7] The case has not yet been reported in the federal supplement. The citation here is to the Education of the Handicapped Law Report, a looseleaf service published by CRR Publishing Co., Wash., D.C. 20005.

parents removed their son from the District of Columbia public schools and placed him in the residential facility. The court found that the private facility was an appropriate program for the child and that the public school's plan did not provide commensurate opportunities. Basing its decision on both the EAHCA and § 504, the court held in January, 1980 that school systems "are obliged to provide [Petitioner] a free and appropriate individualized education (citations omitted)." When a residential placement is necessary to afford such an education it must be provided at no cost to the parents (citations omitted)." It then ordered the local education agency to assume financial responsibility for the maintenance and placement of the handicapped children retroactive to May, 1979, the

date on which it originally denied the parents request for a preliminary injunction. Thus, despite the fact that the child was removed during the pendency of the proceedings, the court found no barrier to granting the requested relief for tuition reimbursement.

In New York, parents of an emotionally disturbed child removed their son from a public high school when his behavior deteriorated in an inadequate program. They placed him in a private out-of-state-school at their own expense. Subsequently, they petitioned the proper local school system committee for reimbursement who denied the request. The parents then sought a hearing before an impartial official who recommended that the school district provide reimbursement. But the committee told the district's board of

education to deny payment. The board accept the recommendation and the parents appealed the decision to the New York State Commissioner of Education who dismissed the case. The Commissioner denied a petition to reopen the matter. The parents then filed an action in federal district court under 20 U.S.C. §§ 1401-1461. In response, state and local school officials moved to dismiss, claiming, in part, that no relief could be granted as the parents had failed to obtain prior approval of the Commissioner for nonpublic school placement. The defendants were urging, the court perceived, that the parents had no choice other than to accept the decision of the Commissioner or to provide a suitable educational alternative at their own expense. That position was held to be antagonistic to the intent of

the EACHA. "In effect, this interpretation renders the Commissioner's decision final and unreviewable. . . and deprives the defendants (sic)[8] of the rights protected by the Education for All Handicapped Children Act. . . namely, the proper and timely identification and placement of handicapped children and assurance of procedural safeguards in the provision of such services." Frankel v. Comm'r of Educ., 480 F. Supp. 1156, 1160 (S.D. N.Y. 1979).

In Howard S., a multiply impaired high school student was placed by his parents in a private school for handicapped children in Texas after he made a suicide attempt, partly as a consequence of misplacement in the school system's program. The district

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[8] In the context of the decision and in light of the fact that the court refused to grant the motion to dismiss, the court could only have meant the plaintiff parents.

disclaimed any responsibility for his special education claiming that his entrance into a hospital for treatment of wounds suffered in his suicide attempt meant that he was no longer enrolled in their system. In addition, they failed to provide a hearing to consider the parents' claim that the school did not provide an appropriate program. The court ordered, among other relief, that the school district's pay the full cost of tuition in the nonpublic facility until it provided all safeguards under the EAHCA and § 504. Howard S. v. Friendswood Ind. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978).

In the most recent and explicit exposition of 20 U.S.C. § 1415(e)(3), a district court in Nebraska interpreted that section precisely in the manner that Petitioner contends it should be and in

stark contrast to the fourth circuit's construction. In a case involving tuition reimbursement for two children with multiple handicaps the court held that the terms "the then current educational placement" in § 1415(e)(3) is to be determined at the time a parent submits a complaint to the local school district "since such a complaint would be the beginning of an administrative proceeding provided by the Act [EACHA]." Monahan v. State of Nebraska, 491 F. Supp. 1074, 1089 (D. Neb. 1980).

The appellate court's decision is also at odds with policy developed by the Bureau of Education for the Handicapped (BEH), the federal agency delegated the responsibility for monitoring the implementation of the EAHCA. In two policy letters interpreting local school system duties under the Act, the agency

has indicated that it considers 20 U.S.C. § 1415(a)(3) to pertain solely to formal administrative and judicial proceedings and not to any prior actions by school officials. In one letter, BEH indicated that a system's interpretation that a child's present placement is "that which the LEA declares it to be" was clearly wrong. The pendency of the proceeding provision applied only, it said, to hearings and appeals under 45 C.F.R. §§ 121a.504, 121a.510-121a.511. 2 EHLR 211:95, 97 (1979). In a subsequent letter BEH again indicated that the pendency provision was meant to encompass only "administrative as well as judicial proceedings." 2 EHLR 211:145, 146 (1980). See Appendix F, pp. 68a-93a for reproduction of these letters.

II. THE COURT'S OPINION VIOLATES THE INTENT AND EXPRESS PURPOSE OF THE EAHCA.

Plaintiff does not quarrel with the fourth circuit's conclusion that, absent an agreement between parents and the school system, the challenged section requires parents to keep children in their current educational assignment during the pendency of hearing and review procedures. What Plaintiff believes is manifest error is the court's conclusion that this "duty . . . arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child. . . ." Stemple v. Bd. of Educ. of Prince George's County, 623 F.2d 893, 898 (4th Cir. 1980). The burden of the court's rationale is that parents have a "duty to preserve the status quo," id., and that this duty would be compromised if parents

unilaterally removed their children from public school programs any time after they were informed of the agency's proposed actions. That this interpretation is contrary to the express purpose and intent not only of the contested provision but to the entire Act and will serve to deny many children their rights under the EACHA to their irreparable harm may be exemplified in the following hypothetical, but not unrealistic, situation.

Suppose parents of a severely handicapped child wish full-time special education in a self-contained special class with a small pupil-teacher ratio. Their child is presently in a regular class with 30 children receiving little or no special help. The school refuses to comply with the parents' request, asserting that the current program is

appropriate. The parents believe, given their child's significant handicaps, that the school's denial of their request creates an intolerable and damaging situation. The parents earn slightly below the average income of three-person families. Under the court's ruling in Stemple and because they cannot afford tuition in a private school without reimbursement, they have no recourse but to keep their child in the public school program. They now invoke the procedural safeguards provisions of 20 U.S.C. § 1415. After exercising their right to be heard at the local education agency (LEA) level, the hearing officer renders a decision (within the 45 days required by 45 C.F.R. § 121a.512) in which the school system's program is deemed inadequate. Because the system has no appropriate program available, the hearing officer

orders nonpublic school placement at public expense. The school system decides to appeal to the state education agency for review. The parents request that the LEA place their child in a small special class during the pendency of this proceeding but it refuses to do so. Because there has been no mutual agreement to change, under 20 U.S.C. §1415(a)(3) and 45 C.F.R. § 121a.513 the parents must keep their child in the regular class although the hearing officer determined that such a program violated the EAHCA. On review, the state hearing official affirms the decision below (within the 30 days allotted 45 C.F.R. § 121a.512(b)). The school then exercises its right to judicial review in federal district court under 20 U.S.C. § 1415(e)(2) and 45 C.F.R. § 121a.511. The court schedules a hearing on this

matter in six months having rejected a motion for expedited review.[9] The trial judge renders a decision in three months, ruling in favor of the school system but on a procedural issue. It does not reach the merits and dismisses the parent's claim. The parents now request reversal of the lower court's decision in the court of appeals. Because the appellate tribunal's docket is crowded with criminal cases, oral argument is not scheduled for five months after the parties have filed their briefs, a process which in itself consumes almost three months. One year after oral argument the court of appeals reverses the lower court and remands the case for a hearing on the substantive issues.

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[9] Scheduling and timelines for a decision are solely within the discretion of this and all other courts as neither the Act nor the regulations contain time constraints upon the judiciary.

However, the LEA petitions the Supreme Court to contest the appellate court's decision and the Court grants certiorari. The Supreme Court upholds the circuit court one and one-half years later. With the procedural wrangle out of the way the district court finally hears the substantive issues. Four months after doing so, it affirms the decision of the state hearing officer, agreeing that nonpublic school placement is the appropriate program for the child.

All of the due process safeguards available to the parties have been exhausted, the "contest is finally determined," id. at 898, and the parents are now entitled to private school placement at public expense. During the pendency of these proceedings, which have consumed four and one-half years, the child has been maintained in a

program that all who have heard the substance of the case have agreed was entirely inappropriate. Unequivocally, that was not the intent of Congress when it enacted the EAHCA nor the Department of Health, Education, and Welfare when it published its regulations implementing the Act. As the fourth circuit recognized, 20 U.S.C. §§ 1401-1461 is a comprehensive statute designed to secure the fullest possible benefits to handicapped children and their families. Id. at 896 citing S. Rep. 94-168, 94th Cong. 1st Sess., U.S. Cong. and Admin. News 1425, 1430 (1975). But that court's interpretation of one small subsection of the Act serves to mitigate, if not destroy, the law's entire intent as reflected in its purpose provisions. See 20 U.S.C. §1401; cf. Monahan v. State of Nebraska, 491 F. Supp. 1074, (D. Neb.

1980) (state-imposed statute of limitations to file complaint in federal court under 20 U.S.C. § 1415(e) undermines federal policy embodied in EAHCA). The right of parents to withdraw their handicapped children from an inappropriate program prior to the initiation of legal proceedings would, on the other hand, serve those purposes.

Under the appellate court's opinion, parents may be punished for their patience and schools' rewarded for their intransigence. As soon as the public agency proposes some action with regard to identification, evaluation, or placement, the parents are locked into the school system and may not be able to escape for several years, i.e., until all legal proceedings have been concluded. Parents who seek to negotiate with the school system and place their trust, at

least initially, in the system's decision should not have to endanger their handicapped children's education.

The fourth circuit, in its opinion, relied very heavily on the principle of preservation of the status quo and reliance on the preliminary injunction as an example of the legal system's concern for maintaining the position of the parties as of the initiation of litigation. But, in doing so the court failed to explain the purpose of preserving the status quo, i.e., to prevent irreparable harm to all parties. Its opinion may serve the goal of maintaining the current status of the litigants but the cost is perpetuation, not prevention, of harm. See P. v. Riles, 343 F.Supp. 1306, 1308 (N.D. Cal. 1972) aff'd 502 F.2d 963 (9th Cir. 1974).

A proper interpretation of 20 U.S.C. § 1415(e)(3), limiting it to its plain meaning, i.e., that while administrative of judicial proceedings are pending children must remain in their current educational placement, would do nothing to harm the public education agency, and would only serve to effectuate the purpose of the EAHCA. Parents who withdraw their children prior to the pendency of proceedings are not automatically assured that they will receive private schooling at public expense. They still bear the risk of a decision by the hearing officer that the local school system was, indeed, able to provide an appropriate program. But, if parents ultimately win, they are only being afforded remedies to which they were entitled under the law, i.e., the right to a free appropriate education for

their handicapped children. However, under the lower court's interpretation, no matter how inappropriate the school's program, parents may not recover should they remove their children from that program to a private appropriate one in the face of the school's hostility, bad judgment or unyieldingness. No court should interpret a statute to protect a wrongful party who has violated that statute. Yet, that is the consequence of the fourth circuit's decision.

Parents are now forced to abide by the school system's proposals, even when they believe them to be totally inadequate, and are precluded from withdrawing their child from the time the school makes its placement proposals until their challenge to those proposals "is finally determined." Id. at 898. The EAHCA was not meant to force parents

to choose between an improper education for their children and the expenditure, with no possibility of recovery, of significant amounts of money to secure an appropriate education. While wealthy parents may be in the position to opt for private placement at their own expense, the appellate court's decision relegates poor parents to an intolerable Hobson's choice. Insofar as its ruling would affect members of the poorest classes of our society in an invidious way it becomes an unconstitutional denial of equal protection. San Antonio Ind. Sch. Dist. v. Rodriquez, 411 U.S. 1, 26 (1973); Griffin v. Illinois, 351 U.S. 12, 16-18 (1956).

CONCLUSION

The "duty" of parents to preserve the status quo once the school system has proposed to identify, evaluate, or place

a handicapped child was created by the fourth circuit in a vacuum. It has no support in the statute's legislative history, the plain words of the EAHCA, all other decisions interpreting the provision in question, or from the administrative agency responsible for its enforcement and funding. In contrast, as Petitioner has shown, there is a substantial body of statutory and decisional support as well as federal policy, which argues against the creation of this duty. In essence, the fourth circuit's decision stands as an anomaly.

Should this Court decide not to grant this Petition, the appellate court's opinion will go uncorrected for an inordinately long time, creating substantial and unwarranted damage. A failure to resolve this significant

federal question will perpetuate a situation in which a remedial statute of national application is administered and applied unevenly in many school districts throughout the United States. Given the competing decisions in Stemple and Capello, for example, whether handicapped children have access to the substantive and procedural rights under the EAHCA under facts such as these cases represent, depends entirely on what side of the District of Columbia boundary line those children live. Handicapped children in the fourth circuit should not have to suffer the loss of federal rights for the foreseeable future while their counterparts in other jurisdictions enjoy theirs. Moreover, the decision works to the severe detriment of handicapped children without any correlative legitimate benefit to school

systems.

Finally, the decision below leaves as guiding precedent in the federal court of the District of Maryland an unfortunate and legally indefensible decision which has the consequence of barring access to judicial review, of placing the persuasion burden on parents in all instances, and especially harmful to future litigants, of erecting an absolute bar to tuition reimbursement under an erroneous analysis of the eleventh amendment's application to the EAHCA and § 504.

Thus, Petitioner respectfully asks this Court to grant its petition for a writ of certiorari so this matter may be considered properly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari was mailed, postage prepaid, this 17th day of October, 1980 to: Paul Nussbaum and Richard Daniels, Attorney for the Board of Education of Prince George's County and other Defendants named herein, 3723 4th Street, Mt. Rainier, Maryland 20822; and Ellen Heller, Assistant Attorney General and Attorney for the State Board of Education of the State of Maryland and its members, One S. Calvert Street, Baltimore, Maryland 21202.

Donald N. Bersoff

Supreme Court, U. S.
FILED
OCT 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-617

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

Elaine Jean Stemple, et. al.,

Petitioner

v.,

Board of Education of Prince George's County, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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October 17, 1980

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October 17, 1980

APPENDIX

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APPENDIX A

ELAINE JEAN STEMPLE, by her father, and next friend, Rosswell C. Stemple, Appellant,

v.

THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; Norman H. Saunders; A. James Golato; Lesley Kreimer; Sue V. Mills; Maureen K. Steinecke; Chester E. Whiting; Susan B. Bieniasz; Jo Ann T. Bell; Bonnie F. Johns, Christine A. Dant, Individually and as members of the Board of Education of Prince George's County,

and

State Board of Education of The State of Maryland; Richard Schifter, William Sykes, Mary Elizabeth Ellis, William M. Goldsborough, Joanna T. Goldsmith, Albertine Thomas Lancaster, Lawrence A. Miller, Charles E. Thompson, G. George Asake, Individually and as members of the State Board of Education of the State of

Maryland, Appellees.

No. 79-1208.

United States Court of Appeals,
Fourth Circuit.

Argued March 3, 1980.

Decided May 27, 1980.

WINTER, Circuit Judge:

Plaintiff, by her father, sued the Board of Education of Prince George's County, Maryland (the County), the Maryland State Board of Education (the State) and, in their individual and official capacities, the persons comprising both bodies to obtain a reimbursement for the tuition cost of her private education. Deeming the proffered educational program in the public schools inadequate for her needs, her parents withdrew her from the public schools and enrolled her in a private school for handicapped children. Plaintiff also challenged the state

regulation assigning the burden of proof in state administrative proceedings, in which she contested the adequacy of the public program and the appropriateness of her school assignment. The district court dismissed the complaint, Stemple v. Board of Ed. of Prince George's County, 464 F.Supp. 258 (D. Md. 1979), and, plaintiff appealed. We affirm, albeit for reasons different from those assigned by the district court.

I.

Plaintiff is a multi-handicapped adolescent girl with a long history of physical and emotional disabilities. Since she has attended school, the County and her parents have recognized that she needed special educational training. From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection to

her placement. During that period, she was taught for the entire school day in the small group setting of special education classes. In January, 1976, the County decided to place her in a normal classroom setting for part of the school day to assist her in developing socialization skills with her peers. By May, 1976, plaintiff's parents concluded that she was not progressing scholastically or emotionally. They therefore withdrew her from public school and placed her in a private non-residential school for handicapped children, located in Alexandria, Virginia. She was a student there until September, 1978, until, after lengthy but cooperative negoations with the County as to the educational program that plaintiff would pursue, plaintiff was re-enrolled in the public schools.

On June 18, 1976, plaintiff, by her father asked the County for tuition reimbursement for her private schooling contemplated for the 1976-77 school year. Her request was pursuant to a state law providing that the cost of a nonpublic school education shall be paid by local authorities of the child's domicile and by the state when the child needs special educational services not provided in a public program. See Ann. Code of Md., Art. 77, § 106D(g). The request was denied in August, 1976. Plaintiff took an appeal, but not until May 27, 1977. A hearing on her appeal was held by the County on August 19, 1977. The hearing officer found that the County could provide plaintiff with an appropriate education in its public schools for the 1976-77 school year and that there was not sufficient evidence to justify her placement in a private school.

Exercising her statutory right to further review, plaintiff appealed the hearing officer's decision to the Maryland State Department of Education Hearing Review Board (the State Hearing Board). See Ann. Code of Md., Art. 77, § 100A. Her appeal was heard on February 17, 1978, and the State Hearing Board's decision was rendered on February 28, 1978. The Board decided that plaintiff "manifests learning needs for which appropriate services can be provided by the Prince George's County Public Schools," and it recommended that she "be returned to the appropriate school within Prince George's County where the support services needed are available." Its findings were directed only to the school year 1976-77 for it deemed itself without jurisdiction to consider funding for May and June, 1976, and the 1977-78 school year.

In the hearing before the State Board, plaintiff sought a ruling that the County bore the burden of proof with regard to the appropriateness of her placement. The requested ruling was contrary to Bylaw 13.04.01.21(B)(6)(h) of the Maryland State Department of Education, which assigns to the party proposing any placement change the initial responsibility to present evidence supporting its appropriateness and places the ultimate burden of proving or disproving appropriateness upon the student's parents, except where school officials do not propose placement in a free educational program. Although the Board ruled at the hearing that it was bound by the bylaw, its decision recited that all of the evidence of all parties had been considered and stated, "[t]his decision is based solely on the evidence and testimony made available for review

and the additional testimony and evidence presented at the hearing."

Plaintiff then instituted this action asserting jurisdiction under § 615 of the Education for All Handicapped Children Act of 1975 (EHCA), 20 U.S.C. § 1415, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Section 615 of EHCA had been enacted by Pub. L. 94-142 on November 29, 1975, but it became effective on October 1, 1977, while plaintiff's appeal was pending before the State Hearing Board but after the occurrence of the operative events challenged in the appeal. Plaintiff sought judicial review of both the substantive result and the procedural fairness of the administrative denial of tuition reimbursement. With regard to procedural fairness, plaintiff sought a ruling that, notwithstanding the Maryland bylaw, the burden of persuasion

throughout the administrative proceedings should be on the County and State and not on her, and that, in the proceeding before the State Hearing Board, the State wrongly introduced a written report which she had had no prior opportunity to examine.

The district court granted a motion to dismiss filed by the defendants. It ruled that plaintiff could not obtain judicial review under § 615 of EHCA because the challenged administrative proceedings concern reimbursement for a period prior to the effective date of EHCA. It ruled also that the challenged bylaw did not infringe § 504 of the Rehabilitation Act, and that it was unnecessary for it to rule on the admission of the challenged written report since plaintiff sought money damages from the state and such a claim was barred by the Eleventh Amendment.

See Stemple v. Board of Ed. of Prince George's County, supra.

II

In plaintiff's appeal, her principal contention is that the district court was in error in ruling that § 615 of EHCA was unavailable to permit substantive and procedural review of the state administrative proceedings. She argues that she sought review to vindicate rights theretofore granted in federal and state statutes, not the creation of those rights; and therefore she seeks no retrospective application of § 615. In any event, she contends further, retroactive application of § 615 would be proper under Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Her remaining contentions are that, in the administrative proceedings, the burden of proof was improperly placed on her, and the

Maryland bylaw with respect to burden of proof violates federal law. She also asserts that her claim for tuition reimbursement is not barred by the eleventh amendment.

As we view plaintiff's appeal, we need not decide any of the issues that she seeks to raise. Her case reaches us in the posture that the sole ultimate issue to be decided is her claim to tuition reimbursement--either for the school year 1976-77 or for the entire period that she attended the private school. She has voluntarily returned to public school; thus any contentions about the burden of proof in administrative proceedings or the effect of the eleventh amendment in the context of this case are real issues only to the extent that they affect her right to reimbursement. By the language of § 615, if it is assumed to be applicable here, we think

that plaintiff has no right to reimbursement, and that there is thus no need to decide the various issues that she seeks to raise. We elaborate on our conclusion that plaintiff cannot obtain tuition reimbursement under § 615 in what follows.

III.

The EHCA of which § 615 is a part was a further strengthening and amendment of title VI of the Elementary and Secondary Education Act, Pub. L. 89-750, first enacted in 1966. The 1966 legislation was passed to create the Bureau of Education for the Handicapped which was intended to provide strong administrative support and leadership for existing programs for the education of handicapped children. The 1966 legislation was first amended on April 13, 1970, by the enactment of Pub. L. 91-230. The 1970 amendment created a separate act,

the Education of the Handicapped Act, and, inter alia, authorized grants to the States to assist them in initiating, expanding, and improving programs for the education of handicapped children.

A second amendment to the basic 1966 legislation was enacted in 1974 by Pub. L. 93-380, entitled the Education of the Handicapped Amendments of 1974. The 1974 legislation extended Title VI for 3 years, increased federal spending and authority, and added state eligibility requirements to bolster "the steadfast Federal commitment to the education of all handicapped chilren." H. Rep. No. 93-805, 93rd Cong. 2d Sess., U.S. Code Cong. and Admin. News, 4093, 4137 (1974).

The 1975 enactment with which we are most concerned was intended "to establish in law a comprehensive mechanism which will insure that those

provisions enacted during the 93rd Congress [the 1974 legislation] will result in maximum benefits to handicapped children and their families." S. Rep. 94-168, 94th Cong. 1st Sess., U.S. Code Cong. and Admin. News, pp. 1425, 1430 (1975). Congress explicitly recognized that court action and state laws throughout the nation had made clear that the right to education of handicapped children "is a present right." Id. at 1441. Of course, a principal purpose of the 1975 enactment was to pump more money into the local school systems to enable them to meet the requirements imposed upon them by earlier laws, but, inter alia, the bill required the states to establish procedures for consultation with individuals concerned with the the education of handicapped children and procedures to monitor the states'

compliance with the requirements of law, to upgrade classification procedures for identifying handicapped children, and to establish procedural safeguards for parents to contest decisions regarding the identification, evaluation and educational placement of handicapped children.

Section 615, a totally new enactment, was adopted to achieve the last objective. It accomplishes a number of things. It requires any state, local or intermediate educational agency receiving federal funds to establish and maintain certain minimum procedures. § 615(a). These include: a parent's right of inspection of relevant records, designation of a surrogate for a child's parents or guardian if they are not known, written notice and an opportunity to be heard whenever an agency proposes to initiate or refuses to initiate a

change in a child's placement, and a right to an "impartial due process hearing." § 615(b)(1)-(2). The section provides further that, if the required hearing is conducted by a local or intermediate educational agency or unit, a person aggrieved by the decision shall have a right to appeal to the state educational agency, § 615(c), where he shall have the right to be represented by counsel, to present evidence and confront, cross-examine and compel the attendance of witnesses, to receive a record of the hearing, and to receive written findings of fact and decisions. § 615(d). The decision made in a hearing conducted in accordance with the provisions of § 615 is final subject to the right of appeal, and the decision of a local or intermediate unit (where there is no right of appeal) or the decision of a state educational agency may be

reviewed in an action instituted in a state court of competent jurisdiction or a district court of the United States without regard to the amount in controversy. § 615(e)(1) and (2).

Significant for our purposes is the further provision of that section, § 615(e)(3):

> During the pendency of any proceedings conduct pursusant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Section 615(e)(3) has little specific legislative history of its own. It is mentioned only in the Joint Explanatory Statement of the Conference Committee (Sen. Conf. R. No. 94-455; Home Conf. R. No. 94-664, both of the 94th Cong. 1st Sess.), where it is said:

> The provisions of existing law with respect to the binding effect of due process hearings and appropriate administrative and judicial review of such hearings are clarified and language is also adopted to require that during the pendency of any administrative or judicial proceedings regarding a complaint, unless the State or local educational agency and the parents or guardian of the child otherwise agree, the child involved in the complaint shall

> remain in his or her present educational placement, or, if the complaint involves an application for initial admission to public school the child shall, with the consent of the parents or guardian be placed in the public school program until the completion of all such proceedings.

[1] Taken literally, the language of § 615(e)(3) creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangement be made. Of course, that duty may not be totally

enforceable by the state, but it certainly negates any right on the part of parents, in violation of the duty and in the absence of agreement, to elect unilaterally to place their child in private school and recover the tuition costs thus incurred.

To the extent that we can discern legislative intent from overall consideration of the 1975 act and its forebears and the brief, specific reference to § 615(e)(3) in the legislative history, we think that the statute should be given the literal effect we have described. By enactment of the 1975 legislation, Congress was assuming major control and major financing of the national program of education of handicapped children. As part of that effort, Congress was providing for the strengthening and upgrading of evaluation procedures and

it enacted a generous bill of rights for parents, guardians, and surrogates of handicapped children who might wish to contest the evaluation and placement policies of educational activities. There would be reason and design in saying that while the procedures for administrative hearings, administrative review and judicial review mandated by Congress were being employed, the status quo should be preserved unless it was altered by consent. The concept of preserving the status quo even including the payment of benefits (see, e.g., Longshoremen's and Harbor Workers' Compensation Act § 21(b), 33 U.S.C. § 921(b)), pending litigation at the administrative and judicial level until an ultimate resolution is reached is a familiar one in American law. For example, under Rule 65, F.R.Civ.P., courts will ordinarily refrain from

issuing preliminary injunctions which threaten to disturb the status quo and they will frame any equitable relief to preserve the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing. 11 Wright and Miller, Federal Practice and Procedure § 2948, at 464-66. Thus we think that the statute means just what it says; and since there was a duty not to move plaintiff until a final decision, plaintiff is lacking in any right to recover tuition payments for her parents' unilateral decision to send her to a private school while she was seeking redress for the claimed violation of her rights.

[2, 3] Plaintiff contends that § 615(e)(3) is inapplicable to her, because her parents' decision to send her to a private school was made before the administrative and appeal provisions of

§ 615 were initially invoked. We reject this contention. It places too restricted a reading on § 615(e)(3). We do not think that the application of § 615(e)(3) depends upon the fine distinction between whether proceedings under § 615 are initiated before or after the duty to preserve the status quo is breached. The duty, it seems to us, arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child and continues until a decision not to contest it is reached or, if a contest ensues, until that contest is finally determined.

In summary, we do not decide plaintiff's several contentions. We decide only that if plaintiff is entitled to avail her self of the remedies of § 615 (a question we also do not decide), they will avail her nothing with regard

to reimbursement of tuition expenses. Her subsidiary contentions have become moot since she voluntarily returned to public school.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1208

Elaine Jean Stemple, by her father, and next friend, Rosswell C. Stemple,

Appellant

v.

The Board of Education of Prince Geroge's County; Norman H. Saunders; A. James Golato; Lesley Kreimer; Sue V. Mills; Maureen K. Steinecke; Chester E. Whiting; Susan B. Bieniasz; Jo Ann T. Bell; Bonnie F. Jones, Christine A. Dant, individually and as members of the Board of Education of Prince George's County

and

State Board of Education of The State of Maryland; Richard Schifter, William

Sykes, Mary Elizabeth Ellis, William M. Goldsborough, Joanna T. Goldsmith, Albertine Thomas Lancaster, Lawrence A. Miller, Charles E. Thompson, G. George Asaka, Individually and as members of the State Board of Education of the State of Maryland,

Appellees

O R D E R

Appellants' petition for rehearing and appellees' reply thereto, having been read and considered, it is, with the concurrence of Judge Butzner and Judge Phillips, ORDERED that the petition for rehearing be denied. No judge eligible to do so has requested a poll on the suggestion for rehearing in banc.

FURTHER ORDERED that the opinion heretofore filed be amended in the following respect: in lieu of lines

three and four, page four of the slip opinion, the following shall be substituted:

> From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection to her placement.

Harrison L. Winter
United States Circuit Judge

Filed August 18, 1980.

APPENDIX C

Elaine Jean STEMPLE, et al.

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, et. al.

Civ. No. Y-78-551.

United States District Court,
D. Maryland.

Jan. 22, 1979.

JOSEPH H. YOUNG, District Judge.

This case has been brought pursuant to Section 615 of the Education for All Handicapped Chidren Act of 1975 (hereinafter "EHCA"), 20 U.S.C. § 1415, and Section 504 of the Rehabiliation Act of 1973, 29 U.S.C. § 794. Plaintiffs, Elaine Jean Stemple, a multiple handicapped child, and her father, Rosswell C. Stemple, seek reimbursement from the defendants, Prince George's County, the State of Maryland, and various County and

State education officials, for tuition expended for special schooling at a private institution. The defendants have moved to dismiss the action, and this motion will be granted.

I.

Maryland law requires that "[t]he cost of [a] nonpublic educational program shall be paid by the State and the county in which the child is domiciled" when the child is "in need of special educational services that are not provided in a public county, regional, or State program." Ann. Code of Md., Art. 77 § 106(D)(g). Elaine, a resident of Prince George's County, has a long history of physical and emotional handicaps, including intermittent hearing loss and poor gross and fine muscle coordination. From 1969 until May, 1976, she had been enrolled in various special education programs in

the Prince George's County public schools. In January, 1976, a decision was made by school officials to "mainstream" Elaine, i.e., to place her in the classroom environment which most non-handicapped children experience. This move was necessitated by Elaine's educational progress in the small group setting of her special education program and her need to develop socialization skills. However, Elaine's parents became dissatisfied with the mainstreaming experiment and in May, 1976, removed Elaine from the public schools and enrolled her in the Leary School, a private non-residential school for handicapped children. Plaintiff attended Leary during the summer of 1976 and for the two succeeding academic years. In September, 1978, Elaine returned to the Prince George's County public schools in a mutually

satisfactory program which was the result of negtiations between Elaine's parents and County school officials.

Since June, 1976, plaintiffs have sought for reimbursement from the County and State for the tuition expended for private schooling at Leary. Plaintiffs' request for reimbursement was denied by the County in August, 1976. On May 27, 1977, plaintiffs requested a hearing which was held on August 19, 1977, to determine whether the available public special education programs were suitable to meet Elaine's learning needs. These administrative proceedings resulted in a finding that the County did provide a program during the 1976-77 academic year which reasonably met the needs of a child with Elaine's learning disabilities. Further, it was concluded that there had been insufficient evidence which would justify Elaine's placement in a private

school such as Leary. Plaintiffs appealed this determination to the Maryland State Department of Education Hearing Review Board, which affirmed the County decision in February, 1978.

II.

Plaintiffs bring this action to obtain judicial review of both the substantive and procedural fairness of the administrative denial of tuition reimbursement. Section 615(e)(2) of the EHCA, 20 U.S.C. § 1415(e)(2), authorizes federal district courts to review the record of administrative proceedings on the educational placement of handicapped children, hear additional testimony, and grant such relief "as [it] determines is appropriate." Section 615(b) of the EHCA, and the federal regulations enforcing Section 504 of the Rehabilitation Act, see 45 C.F.R. § 84.36, mandate certain procedural

guarantees which must be afforded students and parents in administrative placement hearings.

Relying upon this statutory authority, plaintiffs advance the following grounds for relief:

(1) The administrative denial of tuition reimbursement was not based upon a preponderance of the evidence;

(2) The plaintiffs unfairly bore the burden of persuasion throughout the proceedings; and

(3) At the proceeding before the Maryland State Department of Education Hearing Review Board, the State wrongly introduced a report which the plaintiffs had no prior opportunity to examine.

III.

The Court can dispose of the first and last of plaintiffs' claims without

reaching the merits of either, and the second of plaintiffs' grounds for relief, the allegedly wrongful allocation of the burden of proof is sufficiently without merit to warrant serious consideration.

A. Substantive Review of the Administrative Proceedings

[1] Plaintiffs rely entirely upon Section 615(e)(2) of the EHCA as authority for a recovery on the basis of a substantive review of the administrative record. However, the critical question presented by the facts of this case is whether the EHCA is effective for the purpose of plaintiffs' present claims.

Although enacted by Congress in 1975, the EHCA did not become effective until October 1, 1977. Further, Paragraph (a) of Section 615 expressly conditions the procedural safeguards

mandated by the Act, including judicial review, upon receipt by the state or local education agency of funds authorized by the Act. The administrative proceedings of which plaintiffs now complain concern reimbursement for a period prior to the effective date of the EHCA and, consequently, the appropriateness of the funds it authorized. Since the benefits which plaintiffs now seek were never supported by EHCA funds, the Act's procedural guarantees are not applicable.

A similar conclusion was reached in Milan v. Board of Education of Prince George's County, Civ. No. N-78-637 (D. Md. September 22, 1978). On facts closely parallel to those of the present case, the Court dismissed a suit brought under the EHCA for denied reimbursement of tuition for private schooling during

the 1977-78 academic year. In Milan, the Court held that since the administrative proceedings challenged under the Act had been initiated prior to the Act's effective date, the challenged proceedings were not mandated by the Act nor subject to the Act's procedural protections. As no fact significantly distinguishes the present action from Milan, its reasoning is persuasive in this instance, barring plaintiffs' claim for substantive review of the State and County proceedings under the EHCA. See also Howard S. v. Friendswoods Indep. Sch. Dist., 454 F.Supp. 634, 637 (S.D. Tex. 1978).

B. Allocation of the Burden of Proof

[2] The Milan holding would entirely dispose of this action were it not for the fact that plaintiffs also

seek relief under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. While the EHCA was not binding on the proceedings held to determine plaintiffs' eligibility for tuition reimbursement for private schooling prior to October 1, 1977, County and State authorities were nevertheless bound to comply with the Rehabilitation Act. Howard S. v. Friendswood Indep. Sch. Dist., 454 F.Supp. at 637. In May, 1977, the Department of Health, Education, and Welfare issued regulations to enforce Section 504. See 45 C.F.R. Part 84 (1977). Recipients of Rehabilitation Act funds are required by 45 C.F.R. § 84.36 to provide certain procedural safeguards "with respect to actions regarding the identification, evalution, or placement" of handicapped children. The minimum procedures

required by the regulations which became effective on June 3, 1977,[1] include only

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[1] Section 504 of the Rehabilitation Act confers upon an aggrieved party an implied right of action to enforce compliance with the Act. Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977). Defendants contend that such an action may not be included in this case because the State was not, at the time of the administrative proceedings in question, obliged to comply with the procedures mandated by 45 C.F.R. § 84.36.

While 45 C.F.R. §84.33(d) did not require full compliance with the Rehabilatation Act regulations until September 1, 1978, the defendants were not among the class of recipients under the Act excused from full compliance until that date. The period of grace permitted by § 84.33(d) was expressly reserved for those recipients "that [were] not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section. . . ." On June 23, 1977, when 45 C.F.R. Part 84 became effective, the State of Maryland had already established educational programs for handicapped children which fully complied with the provisions of § 84.33, requiring recipients to provide a

"notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure." 45 C.F.R. Part 84, App. A at 387. Allocation of the burden of proof in placement proceedings upon school authorities is not a procedural guarantee mandated by the Rehabilitation Act. Nor can the Court, in view of the procedures afforded the plaintiffs,[2]

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[1] a free appropriate education to all handicapped children. See Ann. Code of Md., Art. 77, §§ 99, 106D. Moreover, by the time the regulations went into effect, the state had already adopted hearing procedures which satisfied the minimal requirements of 45 C.F.R. § 84.36. Thus, as the State was already in compliance with the relevant federal regulations at the time these regulations became effective, the regulations were immediately binding upon the state.

[2] The procedural protections afforded parents and students in local placement hearings are set forth in Code of bylaws of the Maryland State Board of Education (hereinafter "State Bylaw"), 13.04.01.21(B). These procedures include notice of the matters at issue,

conclude that the allocation of the burden of proof to parents and students challenging the appropriateness of available public programs[3] has denied

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[2] (B)(3), the right to inspect and copy all records pertaining to the child, (B)(4), the right to be represented by counsel at the hearing, (B)(5), the right to present evidence through documents and witnesses, (B)(6)(a), the right to require the attendance of witnesses, (B)(6)(b), the right to question the witnesses presented by the school authorities, (B)(6)(c), the right to an impartial decision maker, (B)(6)(d), the right to a decision based solely on the evidence presented, (B)(6)(g), and a right to an administrative appeal of the decision, (B)(7).

[3] See State Bylaw 13.04.01.21(b)(6)(h), which provides, as follows:

> It shall be the initial responsibility of the party proposing any placement action to present evidence which supports its appropriateness and then any evidence to the contrary shall be presented. The ultimate burden of proving or disproving appropriateness by a prepondernace of the evidence shall be upon the parent(s) or guardian(s), except that school officials shall bear the burden when a placement action proposed

plaintiffs the "meaningful opportunity to be heard" which due process affords. [4]

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[3] by them does not involve placement in a free educational program. A placement shall be deemed appropriate if it reasonably meets the educational needs of the child and there do not exist any significantly less restrictive programs which would satisfy such needs equally well.

[4] In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court observed that "[t]he essence of due process is the requirement that a 'person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it.'" Id. at 348, 96 S.Ct. at 909 (citation omitted). Typically, the procedures satisfying the requirements of due process are embodied in the protections provided in State Bylaw 13.04.01.21(b). These procedures include:

"(a) Notice and specification of the charges.
(b) Opportunity to be heard.
(c) Opportunity to confront accusers.
(d) An impartial tribunal."

See Patterson v. Ramsey, 413 F. Supp. at 536. The procedures provided by the State afforded plaintiffs ample opportunity to present their case for tuition reimbursement. Morover, plaintiffs allege no violation of these procedural requirements at the local

See, e.g., Patterson v. Ramsey, 413 F.Supp. 523, 540 (D. Md. 1976), aff'd, 552 F.2d 117 (4th Cir. 1977); also Chung v. Park, 514 F.2d 382, 387 (3d Cir. 1975); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), cert. denied, 409 U.S. 1130, 93 S.Ct. 951, 35 L.Ed.2d 263 (1973). Accordingly, the County proceedings subject to State Bylaw 13.04.01.21(B)(6)(h) were not thereby rendered institutionally nor statutorily infirm.

C. Introduction of Records which Plaintiff had no Prior Opportunity to Examine

[3] This final claim concerns an alleged procedural impropriety at plaintiffs' hearing before the Maryland

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[4] hearing. Inasmuch as the allocation of the burden of proof affected only the weight given the plaintiffs' contentions once plaintiffs had exercised their right to be heard, and as the burden in question is neither excessive nor extraordinary, it in no way diminished plaintiffs' opportunity to be heard.

State Department of Education Hearing Review Board. At the hearing, Virginia Cieslicki, a placement specialist with the special education division of the Maryland State Department of Education, read into evidence a prepared written statement which constituted the Department's official position on the appropriateness of the placement offered Elaine. This position statement was made pursuant to State Bylaw § 13.04.01.21(A)(5)(d), which requires the Department to present, "preferably in writing or orally if the Hearing Review Board desires, a complete review of the State Department of Education's position supporting the action that has been taken." Plaintiffs contend that the statement should not have been introduced by state authorities because they had no prior opportunity to examine it. However, the Court need not reach

the merits of this claim because the state defendants, who were responsible for the proceeding in question and any alleged wrong to the plaintiffs, are immune from suit in this action under the Eleventh Amendment.

While the Eleventh Amendment expressly bars suit against a state by a foreign government or the citizens of another state, judicial construction of the Amendment extends this immunity to preclude suits against a state by its own citizens. See Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (and cases therein cited). This constitutional immunity proscribes actions by a private party or foreign government which, absent consent by the state, seek "to impose a liability which must be paid from public funds in the state treasury." 415 U.S. at 663, 94 S.Ct. at 1356.

However, since the time of the Supreme Court's decision in Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Eleventh Amendment has been held not to bar prospective injunctive relief against a state, even though such relief may have some impact on state funds. Edelman v. Jordan, 415 U.S. at 667, 94 S.Ct. 1347. In Edelman, the Court distinguished such prospective relief which is permissible under Ex Parte Young, supra, from a retroactive award of damages made in reparation for past wrongs. Edelman involved an appeal of a district court's retroactive award of welfare benefits which claimants would have received had their claims been processed in accordance with HEW regulations. While upholding the lower court's determination that the benefits had been wrongfully denied, the Court nevertheless vacated all but the

perspective relief awarded to the parties, observing:

> "While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Edelman v. Jordan, 415 U.S. at 688, 94 S.Ct. at 1358 (emphasis provided).

Applying the above principle to the facts of the instant case, the Court must conclude that plaintiffs are effectively seeking an award of damages against the state.[5] Plaintiffs have alleged a past

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[5] Counsel for plaintiffs conceded in oral argument that money was the ultimate issue in its claim for relief. Nominally, plaintiffs have brought this action seeking injunctive relief entitling them to another administrative hearing to secure reimbursement. However, as Elaine has already been placed in an adequate public educational program, the only conceivable consequence of a judgment against the state would be to facilitate a monetary recovery. To afford plaintiffs an opportunity to raise again their claims for monetary relief, the Court must find plaintiffs implicitly entitled to recover funds which another administrative proceeding might provide. As the Court is precluded by the Eleventh Amendment from directly ordering the State to reimburse the plaintiffs for educational fees, absent waiver, see Edelman v. Jordan, supra, it is constitutionally precluded from achieving indirectly which it could not do directly. Cf. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

breach of a legal duty respecting certain procedural defects in the state review of her request for tuition reimbursement, and by challenging the procedural correctness of the denial of this request, plaintiffs ultimately seek a recovery of money from the state which is precluded by the Eleventh Amendment. See Edelman v. Jordan, supra, Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977).

Inasmuch as plaintiffs have stated no claim against the County defendants which this Court has jurisdiction to entertain or which warrants it serious consideration, resolution of the state defendants' Eleventh Amendment objection to liability accordingly disposes of this action. Only the state defendants were legally responsible for the conduct

of the proceeding before the State Department of Education Hearing Review Board. See Ann. Code of Md., Art. 77 § 100A. Moreover, other than the claim under Section 615 of the EHCA, which has been held to be of no legal consequence, and the burden of proof claim, which is without merit, plaintiffs have cited no breach of a legal duty for which the county defendants may be found liable. Despite the fact that under Maryland law, the State and the County are jointly responsible for providing funding for Elaine's education, see, e.g., Ann. Code of Md., Art. 77, §§ 106D(g), 106G-3, 106G-4, the present action would permit a possible judgment only against the state defendants, and such judgment is barred by the Elventh Amendment.

Accordingly, it is this 22nd day of January, 1979, by the United States

District Court for the District of Maryland, ORDERED:

1. That the motions to dismiss of each and every defendant be, and the same are, hereby GRANTED; and

2. That copies of this Memorandum and Order be mailed to the attorneys for the plaintiffs and the defendants.

APPENDIX D

Maryland State Department of Education
P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

February 23, 1978

Dr. Linda J. Jacobs
Assistant State Superintendent
Maryland State Department of Education
Division of Special Education
P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

Dear Dr. Jacobs:

The Maryland State Department of Education Hearing Review Board convened on February 17, 1978, and heard the case of Elaine Stemple relative to the diagnosis and evalution of the educational program provided for the child by the Prince George's County School System.

The hearing was held in accordance with Article 77, Section 100A of the Annotated Code of Maryland, Volume XLIX, June 1975, with the following reviewers

hearing tne case: Dr. Betty Sims, Chairperson, Ms. Rozelle Miller and Mr. Lynn Jones.

The Hearing Review Board has reviewed the diagnostic data supplied by the Prince George's County Public School System and that provided by the parents. In addition, the plans evidenced by the Prince George's County Public School system to provide for Elaine Stemple in the 1976-77 school year were reviewed, as was the evidence presented by her present school placement. After reviewing all evidence made available by the Prince George's County Public Schools and the Leary School, the panel has arrived at a decision. This decision is based solely on the evidence and testimony made available for review and the additional testimony and evidence presented at the hearing.

The Hearing Review Board has duly

noted objections of the attorney for Elaine Stemple and the Prince George's County Public Schools for the records. The findings of the Board are directed to the school year 1976-77 only. The Board is without jurisdiction to consider funding for May and June, 1976 and the 1977-78 school year. The parents have the right of due process for the current school year.

The Hearing Review Board finds that Elaine Stemple manifests learning needs for which appropriate services can be provided by the Prince George's County Public Schools.

This finding is predicated upon the following review:

There is extensive psychological and educational assessment data from 1969 through the present. Review by the Hearing Review Board of the diagnostic information indicates that Elaine

Stemple is a child with learning disabilities. The learning disabilities manifest themselves in processing, language and motor problems. This finding is consistent with those stated in a letter by Dr. Gardner (2-9-78). She states that there is a myriad of secondary malfunctions associated with minimal brain damage, thus clarifying the etiology of the learning deficits.

In addition to the learning disability and associated behaviors, there is a history of an intermittent hearing loss related to an allergy. Early reports from Children's Hearing and Speech Center (10-7-69) indicated a moderate hearing loss, possibly delaying early speech development. Later reports from Prince George's County Health Department (11-10-70 and 9-3-71) indicated that the hearing level was with normal limits. The recent reports from

University of Maryland Hospital Central Evaluation Clinic for Children (1-18-78) states that hearing is presently within normal limits.

The conditions as delineated above, plus the estimate of borderline to dull normal intellectual functioning are within the range of behaviors found in the public schools of Prince George's County. The Hearing Review Board, therefore, finds that Elaine Stemple can be included in a public school program.

In considering the educational program for Elaine Stemple, it is noted that at the time of entry into the Leary School, an evaluation (7-9-76) states "Elaine has shown us that she has good basic reading and phonics skills. . . Elaine is able to add, subtract, multiply and divide with good accuracy. . . She is very eager to contribute to discussions. . . She has an adequate

supply of general information." She was rated "satisfactory" in classroom performance. in personal adjustment and in peer relations. This substantiated that academic skill and social development had occurred while Elaine was in the Prince George's County Public Schools. Testimony by Elaine's teacher also confirms progress commensurate with the reports prior to the time of termination from the public schools (10/76 through 6/77). This further confirms progress consistent with intellectual expectations.

It is recommended that Elaine be returned to the appropriate school within Prince George's County where the support services needed are available.

The Individual Education Program should be reviewed and further developed by school personnel, Elaine and her parents. The Program should include

vocational training to allow for the use and further development of the functional skills she has attained.

Counseling for Mr. and Mrs. Stemple to assist them in management of behavior and settling long-range goals for Elaine should be offered.

In behalf of the Hearing Review Board

/s/ Betty Simms

Betty Simms
Chairperson

APPENDIX E

In the Matter of Elaine Jean Stemple: Before the Prince George's County Hearing Officer for Special Education Programs.

Decision

This Matter was referred to the Hearing Officer by the Prince George's County Public Schools for a hearing. The hearing was held on August 19, 1977 at the Northern Area Office of Special Education of Prince Geroge's County.

Both the Staff of the Prince George's School System and Mr. and Mrs. R. Stemple were represented by Counsel. Mr. and Mrs. Stemple elected to have a closed hearing.

The Hearing Officer took under advisement the following: 1. petitioner's objection to the Hearing Officer's preliminary statement that the burden of proof is upon the petitioner rather than the school board citing the

Rehabilitation Act, Sec. 84.34 as an authority. The Hearing Officer finds that the burden referred to is not applicable to this situation in that it only applies when the school system wishes to remove a student from the regulation educational environment, and 2. the question brought out by the staff that the petitioner was requesting funds for May and June of 1976. According to Local Hearing Procedures, Rule 13.04.01.21B3d. it stated that the parents may at any time prior to the ending of the school year, make a request for reimbursement. The parents having failed to do so, it is the opinion of this examiner that she has no authority to hear the question. The year 1976-77 is the year in question and there is no problem in the request. The petitioner also asked for the following full year. It is the position of the Hearing Officer

that she has no authority to hear such question in that it is impossible to make educational assessments of a child's need for two (2) years in the future.

After consideration of all the evidence and testimony presented at the hearing by both parties and due deliberation I find that the Prince George's County School System did have a program during the school year 1976-77 and does have a program which reasonably meets the needs of Elaine Jean Stemple and further, that there has been insufficient evidence which would justify placement of Elaine Jean Stemple in a non-public educational institution such as the Leary School.

Dr. Lucy C. Kotarides
Hearing Officer.

Re: Elaine Jean Stemple

In keeping with procedures established by the Maryland State Board of Education and Prince George's County Board, a review of the case of Elaine Jean Stemple was heard by Dr. Lucy C. Kotarides, Hearing Officer. Representative of the Prince Geroge's County School System and Mr. and Mrs. Stemple (both parties were represented by counsel) presented their respective cases at the petitioner's request the hearing was declared closed to the public.

The placement of Elaine Jean Stemple recommended by Prince George's County Public School System was rejected by petitioners as inappropriate for their daughter. They subsequently applied for funds to defray the cost of

education at a small non public private school, Leary School, which they maintain is an appropriate placement for her. To obtain this assistance it must be shown that the available program at William Beanes Elementary School is not an appropriate program.

In accordance with provisions of Bylaw 411:111 (13.04.01.01 A-4) under which this hearing was conducted, I would like to provide you with a statement of findings and conclusion upon which this decision is based. The following are the specific findings and conclusion:

1. Based on petitioners' exhibits 2-2, 92, 14, Elaine Jean Stemple is a child with a learning disability.
2. That her learning problems include deficits in expressive language, poor speech articulation and perceptual motor difficulties, (petitioners exhibits 3-2, 14.)

3. That Elaine possesses sound intellect (petitioner's exhibit 9-2) (staff exhibits 3-1.). That although she functions within the border-line defective range, her variable performance on psychological testing suggests average potential.

4. That Elaine has normal hearing (petitioners' exhibit 3-2, 7, 12). That a chronic ear infection and allergies cause fluid to accumulate in the ear resulting in an intermittent hearing loss and that with proper medication and treatment normal hearing is restored, (petitioners' exhibit 25-5).

5. That in 1969 Elaine was enrolled in the Prince Geroge's County Public Schools and attended Suitland Elementary.

6. That on December 1, 1970 Elaine was referred for Psychological evaluation (staff exhibit 3-1), it was recommended that she needed special services and that she be placed in a special education program.

7. That Mr. & Mrs. Stemple were notified of said referral and placement in a special education program and that during the school year 1971-72, Elaine was placed in a special education class.

8. That while Elaine attended special education classes her needs were adequately evaluated and assessed through the use of formal and informal testing, petitioners' exhibit 8, 17, 20-1, 20-2.

9. That as a result of her continued progress in mid-year of the 1975-76 term the educational team felt it

appropriate to mainstream Elaine for a trial period in a regular classroom situation with continued assistance by the special education teacher (staff exhibit 15).

10. That in May 1975 Mr. Stemple removed Elaine from the William Beanes Elementary School and enrolled her in the Leary School, this in spite of her progress and Elaine's testimony at the hearing that she liked the William Beanes School.

11. That an examination of the Prince George's educational management plan and the Leary School plan for Elaine are similar. Both plans provide for academics Language Arts, speech therapy and gross motor activities.

12. That the Leary School program places Elaine in a small structural

classroom situation for a full day's program while the program at the William Beanes School places Elaine in a small structured classroom for a period of two hours daily.

13. That the Prince George's County Public Schools did arrange for an appropriate education for Elaine in the least restrictive environment.

In accordance with Bylaw 411.11, I would like to advise you that you have a right to appeal the aforestated decision of the Hearing Officer. This appeal is to be made to the State Department of Education. If you wish to appeal this matter, you are required to file a written request for appeal. This written request should be mailed to:

Dr. Linda Jacobs
Assistant Superintendent of Schools
Maryland State Department of Education P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

In the interim if the Office of Special Education can be of assitance to you do not hesitate to contact Mrs. Jane Riggin at 301-952-4360.

Yours Truly,

/s/ Lucy C. Kotarides

Lucy C. Kotarides
Hearing Officer

APPENDIX F

Letter One

Inquiry by:
James T. Micklem, Director
Div. of Special Education and
Support Services
Dept. of Education
P.O. Box 60
Richmond, Virginia 23216

Text of Inquiry
(January 17, 1979)

This refers to our recent telephone conversation pertaining to funding for a child previously placed by an LEA in an approved private school for the handicapped but whose renewed funding is to be determined pending an appeal through established due process procedures.

Basically, the situation is as follows:

1. The child was determined eligible for services by a public school division for the 1977-78 school year.

2. The child was placed in a private school for the handicapped during that school year as school division personnel felt an appropriate educational program was not available locally.

3. A request for continued placement in the private school was made to the local school division for the school year but was denied on the grounds that an appropriate program was available locally. Parents initiated an appeal through the due process procedure.

4. The school division has taken the position, based upon advice of the school's attorney, that funding would be available to the parent only if the school division loses the appeal for that period of time the child attends the private

school during the pending of the appeal.

Your interpretation of federal regulation regarding this matter is requested. For your infromation, I have enclosed a copy of an informal opinion received from the Virginia Attorney General's Office pertaining to this issue. [Opinion has been deleted].

Text of Response
(March 14, 1979)

You asked if a local school district is responsible for the cost of tuition, during a due process hearing on the appropriateness of that placement, when the parent has placed the child in a private school without prior agreement of the local school district. Parents may choose to send a child to a private school rather than take advantage of a free appropriate public education. If this happens, there is no requirement for

the State or local educational agency to bear the cost of the private school tuition. In this situation the cost of tuition could not be considered the responsibility of the State or local educational agency under the provisions of the Part B regulations (121a.513) unless the public agency and the parents of the child agree. This agreement is unlikely in that the placement is the substance of the disagreement under consideration in the due process hearing.

On the other hand you also asked if a local school district is responsible for the cost of tuition, during a due process hearing, when a local school district has placed the child and a disagreement develops as to the continuation of such a placement. In this case the provisions of the Part B regulations (121a.513) shall apply. Therefore the

local school district must continue the payment of tuition until all due process proceedings have been completed. This included judicial proceedings as well. Exceptions may be taken to this provision if both the parents and the school district agree otherwise.

Payment for the cost of tuition during the pendency of a due process proceeding is not to be considered a retroactive payment based upon the success of a parent's complaint in a due process proceeding when a child is placed by the State or local educational agency. The payment of the cost of tuition is to continue during a due process hearing if the local or State educational agency has placed the child.

William D. Tyrrell, Chief
Policy Section
Bureau of the Education for
the Handicapped.

'ext of Inquiry
(May 1, 1979)

You will recall our earlier correspondence regarding the responsibility of a local school board to maintain and finance the education of a handicapped child in a private school during the pendency of an administrative or judicial appeal.

At' issue is a situation in Fairfax County, and you can see from the enclosed correspondence the questions that have been raised by Mr. Thomas J. Cawley, Esquire, Counsel to the Fairfax County School Board. Please see what you and your staff can do to help me answer the specific questions raised by Mr. Cawley.

(Enclosed Correspondence)

As counsel to the School Board of Fairfax County, I am writing to you with regard to your recent letters on the

question of whether a school board has the responsibliity for funding the continuation of a private placement where the school board has now offered a placement within the system or a less restrictive private placement. I have the following observations.

1. You have previously shared with Mrs. Beatrice H. Cameron your correspondence with the Bureau of Education for the Handicapped. While it was apparent from those letters that the question was to be referred to the Office of the General Counsel of the Department of Health, Education, and Welfare, the ultimate response was from the Chief of the Policy Section of BEH. It is therefore unclear to us whether the response from BEH represents a legal opinion of HEW or merely a policy view of BEH.

2. The practical consequence of the position expressed in the letter from Mr. Tyrrell of BEH is that once a child is placed by a local board in a private special education setting, it will not ever be able to return the child to a less restricted educational environment unless the parents agree. This is because the due process appeals including the judicial avenues available to parents will in every case take at least a school year to resolve. Of course, the parents can initiate a new appeal each school year. This will mean that <u>regardless</u> of the outcome of the hearings and judicial consideration of the merits of the case, the private placement will continue year after year. Effectively, the

decision of the parents on the question of appropriate special education will control even if all hearing officers and judges agree with the position of the school board.

The policy of continuing funding will also cause, in my view, increased appeals (since it will insure private funding) and it may cause school boards to be very reluctant to consider trying private placements for a trial period of a year since they will realize that it will be impossible to ever discontinue funding unless the parents agree.

3. I think the position of continuing payments during appeals is wrong from a legal standpoint. The local education agency is required to determine at least annually each

handicapped child's placement. 45 C.F.R. § 121a.552(a). A child must remain in his or her present educational placement during the pendency of any administrative or judicial proceeding. 45 C.F.R. § 121a.513(a). Read together, these two sections mean that the child's present placement is that which the LEA declares it to be. This conclusion is buttressed by §121a.504. That section provides that parental consent must be obtained before:

(a) Conducting a preplacement evaluation; and

(b) Initial placement of a handicapped child in a program providing special education and related services.

45 C.F.R. §121a.504(b) (emphasis supplied). It follows that it is

unnecessary to obtain parental consent before changing a child's placement from a private special education facility to a public special education facility. Since it is unnecessary to obtain consent in such a case, it is clear that the LEA's declaration of placement is effective immediately and is, therefore, the "present placement" as that term is used in § 121a.513(a). It follows that the LEA cannot be held responsible for costs incurred by leaving the child in a private school when an appropriate public facility has been offered. If the public facility is found to be inappropriate then the LEA should pay the expenses incurred during the time of the appeal.

Nor does this interpretation prejudice the due process rights of the parents or child. Under the regulations, the child may continue to receive an education at public expense. In this particular instance, the education will be offered in the facility chosen by the LEA until that agency's decision is proved wrong by the parents. The Act only guarantees that a handicapped child will receive "a free and appropriate education," it does not guarantee that such a child will receive an education preferred by the parents.

I have previously been supplied a copy of an informal Attorney General's opinion on this subject. That opinion states that, "Since the issue of an appropriate program is being determined by due process procedures, there is no

mandate under Public Law 94-142 or Virginia law for a school division to pay the private school pending the outcome of the case."

It seems to me that the philosophy of Public Law 94-142 is that neither the school system nor parents should be able to make an irrebuttable decision as to what is the least restrictive appropriate special education for the child. It therefore seems inconsistent with the goals of this law to establish a procedure whereby the parents can effectively eliminate the school system's position on placement and guarantee years of funding of an inappropriate placement for the student. Certainly the student is not served by that situation.

I would appreciate your inquiring into the legal position of HEW's Office of the General Counsel and the Virginia

Attorney General's office on this subject and your consideration of the other points of this letter. Thank you.

Text of Response
(May 15, 1979)

The following is in response to your letter of May 1, 1979 regarding the responsibility of a local school board to maintain and finance the education of a handicapped child in a private school during the pendency of administrative or judicial proceedings.

This issue was addressed in a letter you received from my staff on March 14, 1979. The BEH's position in this matter is summarized in paragraphs three and four of that letter. The HEW Office of General Counsel has reviewed this matter and concurs in those interpretations of the statute and regulations.

We do not agree with the statement in Mr. Cawley's letter that under 45

C.F.R. § 121a.513 (the requirement that a child's present placement must be maintained during administrative or judicial proceedings), "The child's placement is that which the LEA declares it to be."

1. It is correct that under Section 121a.552 of the regulations, an LEA must annually determine a handicapped child's placement. However, this must be done through a reassessment of the child's Individualized Education Program (IEP) with the parents involved as required in Sections 121a.340-121a.349. A change in placement cannot be made unilaterally be the LEA.

2. If the parents and LEA cannot agree on the proper placement, the LEA may propose to change the existing placement, but not before it gives

the parents the notice required under Sections 121a.504-121a.505.

3. The notice to the parents informs them of their procedural rights under the statute and regulations. The parents may initiate a hearing under Section 121a.506, and if they do not prevail at the hearing, may exercise their appeal rights under Sections 121a.510-121a.511.

A concern was expressed in Mr. Cawley's letter that the hearing, State Review, and civil action available to parents would result in an inordinate delay before a child's placement could be changed. However, it is our understanding that very few civil actions result from these cases. Further as you know, the regulations specify timelines for the hearing and State Review. If an LEA begins the IEP Review

at an early date each year, and the hearing and review timelines are adhered to, the delays in making necessary changes in a placement should be minimized.

It is the State's responsibility to insure that the Fairfax County LEA complies with the requirements summarized in this letter and in the letter of March 14, 1979. Please inform us by June 15, of the action the State has taken to resolve this matter with the LEA.

Thomas B. Irvin, Chief
State Policy and Administrative
Review Branch
Bureau of Education for the
Handicapped.

Inquiry by:
Mr. T. D. Beck
5119 Concordia St.
Fairfax, Va. 22031

Letter Two
"ext of Inquiry
(October 30, 1979)

I would appreciate it very much if you could provide clarification of the rules and regulations pertaining to the Education of the Handicapped Act. Clarification is requested on the following issues.

1. Responsibility and requirement for the school system to implement an Individual Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the public school official, private school officials and the parent.

2. Responsibility and requirement for the school system to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the

parents do not agree to delete these provisions and have initiated a due process review? Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

This information is needed for a state review of a special education hearing. A reply by November 9, 1979 is requested.

Text of Response

This letter is being developed in response to an inquiry you sent on October 30, 1979 requesting clarification of the P. L. 94-142 regulations. I will attempt to respond to each of your concerns as stated.

1. Responsibility and requirement for the school system to implement an Individualized Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the school official, private school officals and the parent.

While the IEP is seen as neither a legal document nor a legal contract it does represent a commitment of resources necessary to enable a handicapped child

to receive needed special education and related services. In fact, the delineation of services to be provided is one of the primary purposes of the document. In effect, the IEP is an agreement (with LEA and parental approval) for services to be provided. Stated another way, the services set out in the IEP must either be provided to the child, or the IEP must be amended.

2. Responsibility and requirement for the school system to continue to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the parents do not agree to delete these provisions and have initiated a due process review?

Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

If the school system placed the child in a given program with specific services as outlined in the IEP and a disagreement develops regarding services being provided, the provisions of Section 121a.513 of the P.L. 94-142 regulations apply if a complaint has been filed.

(Text of Reg. 121a.513 is deleted.)

Therefore, the local school district must continue services until all complaint proceedings have been completed. This includes administrative as well as judicial proceedings. Exceptions to this provision may be taken only if both the parents and the school district agree otherwise.

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

Section 121a.302 of the 94-142 regulations states that if placement in a public or private residential placement is necessary to provide speical education and related services to a handicapped child, the program including non-medical care and room and board must be at no cost to parents. Clearly, transportation and psychological services are to be provided if necessary as a part of the related services component as

delineated in Section 121a.13(a) and (b)(8) of the aforementioned regulations. Caution must be exercised to assure that "psychological services" to be provided falls within the criteria of 121a.13(b)(8). The issue of whether psychotherapy should be included under related service is under study. The nature of the services rendered under this terminology causes it to become a semantic problem that must be stated specific.

The federal regulations address the delivery of services as specified in the IEP. The special education and related services to be provided for the handicapped child must be delineated in the IEP prior to placement in a private school or institution. The requirement is defined in Sections 121a.347 and 121.343 of the regulations of 94-142. All of these provisions must be met.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

As indicated in the response to issue No. 1, above, the services set out in the IEP must either be provided to the child or the IEP must be amended. At this time, no Federal policy position on the provision of a 12 month program has yet been developed, although litigation is occurring in several States on this issue (most notably, in Armstrong v. Kline (E.D. Pa. 1979)). The answer provided for issue No. 3 concerning psychological services applies to day school as well as residential placements.

We hope that these responses are helpful to you as you prepare for your hearing. If we can be of further assistance feel free to write or call me at (20) 245-9405.

William D. Tyrrell
Chief, State Policy Section
State Policy and Administrative
Review Branch, DAS
Bureau of Education for
the Handicapped.

No. 80-617

Supreme Court, U. S.
FILED
JAN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELAINE JEAN STEMPLE, ET AL.,

Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS, THE STATE BOARD EDUCATION OF MARYLAND AND THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, THE STATE BOARD OF EDUCATION OF MARYLAND AND THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Under § 615(e)(3) of the Education for All Handicapped Children Act of 1975, does the duty to keep a child in his or her then current educational placement during the pendency of any review proceedings arise as soon as school authorities have made a decision as to the identification, evaluation, and placement of a handicapped child?

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PRELIMINARY COMMENT

Respondents, the State Board of Education of Maryland (the "State Board") and the Board of Education of Prince George's County (the "County Board"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this case. The Fourth Circuit opinion is reported as *Stemple v. Board of Education of Prince George's County, et al.*, 623 F.2d 893 (4th Cir. 1980), as amended by Order of August 18, 1980, No. 79-1208. The District Court opinion is reported at 464 F. Supp. 258 (D. Md. 1979).[1]

STATEMENT OF THE CASE

1. *Introduction*

Elaine Stemple is a multi-handicapped child with a long history of physical and emotional disabilities. She was enrolled in various special education programs in the Prince George's County public school system from 1969 until May, 1976. During that time her parents voiced no formal objection to her educational program. App. A at 2a; App. C at 10a.[2]

Until January, 1976, Elaine's educational placements in the public schools were in small, special education group settings. At that time, school officials made a decision that her special education program should include placement in a normal classroom setting for part of the school day. The purpose of the change was to assist her in developing socialization skills with her peers. *Id.* Petitioners do not

[1] The Court of Appeals' decisions are reprinted as Appendix A and Appendix B to the Petition for Writ of Certiorari (the "Petition") and the District Court opinion is reprinted as Appendix C to the Petition.

[2] All references to appendices are to appendices to the Petition, unless otherwise stated.

allege that school officials violated procedures mandated by any State or federal statute when they made the placement determination in January, 1976.

In May, 1976, without initiating the proceedings provided by state law to parents who wish to change a child's placement,[3] Elaine's parents withdrew her from the public school and placed her in the Leary School, a private institution for handicapped children. App. A at 2a-3a; App. C at 10a. This was a unilateral decision by the parents. App. A at 6a. Public school officials did not suggest, recommend or require Elaine's removal from her public school placement, or suggest an alternative placement. Elaine remained at the Leary School until September, 1978, at which time she returned to the Prince George's County school system in a program agreed upon by her parents and school authorities.[4] App. A at 2a-3a; App. C at 10a.

2. *Administrative Proceedings*

On June 18, 1976, the Stemples filed a request for reimbursement of the tuition for the Leary School for the upcoming 1976-77 school year, pursuant to Md. Ann. Code Art. 77, § 106D(g)[5] which states in pertinent part that "[t]he cost of [a] nonpublic educational program shall be paid by the State and the County in which the child is domiciled" when a child is "in need of special educational services that are not provided in a public . . . program." After this request was denied by the Prince George's County public school in August, 1976, the Stemples took

[3] These proceedings will be described in the Respondents' argument against the grant of certiorari.

[4] As will be stated in giving the chronology of administrative and court proceedings, Elaine's return to public school narrowed the case to a claim for monetary relief.

[5] Because this case involves the 1976-77 school year, unless otherwise indicated, all statutory references to State law are to statutes in effect at that time.

no action until May 27, 1977, at which time they requested a hearing to determine the suitability of available public special education programs to meet Elaine's learning needs. App. C at 10a.

After a County hearing held on August 19, 1977, the independent hearing officer found that the County could have provided Elaine with an appropriate education within its public schools for the 1976-77 school year, and that there was not sufficient evidence to justify the child's placement in a private school. App. A at 3a; App. C at 10a; App. E at 18a.

Petitioners appealed this decision to the Maryland State Department of Education Hearing Review Board ("State Hearing Board") pursuant to Md. Ann. Code, Art. 77, § 100A. The state level hearing occurred on February 17, 1978, and a decision agreeing with the lower tribunal's decision was rendered on February 28, 1978. App. A at 3a; App. C at 10a; App. D at 15a.

The State Hearing Board specifically stated that its findings were "directed to the school year 1976-77 only" and that it was "without jurisdiction to consider funding for May and June, 1976 and the 1977-78 school year." As part of the decision, the parents were advised that they had a right to initiate an appropriate appeal for the latter time periods. App. A at 3a; App. D at 15a.

3. *Proceedings in the District Court*

On March 31, 1978, Petitioners brought this action against Respondents in the United States District Court for the District of Maryland. Petitioners claimed jurisdiction under § 615, the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(4), and § 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794.[4] By their

[4] Section 615 of the EAHCA was enacted on November 29, 1975, but did not become effective until October 1, 1977. When

complaint, Petitioners sought judicial review of the State Hearing Board decision that the County Board could have provided Elaine an appropriate public school program for the 1976-77 school year.

The Stemples raised three issues before the District Court:

(1) That the decision of the State Hearing Board was not based on a preponderance of the evidence;

(2) That the parents of Elaine Stemple unfairly bore the burden of persuasion during the administrative proceedings; and

(3) That the State Department of Education introduced a report during the hearing which Petitioners had not reviewed.[7]

The District Court entered a final judgment dismissing the action on January 22, 1979, holding that the Eleventh Amendment barred any award of monetary relief. As stated above, Elaine had already returned to a County public school in a program that met with the approval of her parents and the school authorities when the case was presented to the District Court. Therefore, injunctive relief was not an issue. In dismissing the case, the District Court was acting only on the claim for monetary relief; namely, tuition reimbursement for the 1976-77 school year.[8]

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the law became effective, all operative events challenged by Petitioners had already occurred and their appeal was pending before the State Hearing Board.

The Education for All Handicapped Children Act will hereinafter be referred to as the "EAHCA" or the "Act." The Act, in its entirety, appears as App. F.

[7] Petitioners did not allege in the District Court that they were deprived of an opportunity for a hearing, or that the Respondents breached any statutory requirements before the parents acted unilaterally to remove Elaine from public school in May, 1976.

[8] Petitioners conceded in oral argument before the court that money was the ultimate issue. App. C at 13a.

4. *Proceedings in the Court of Appeals*

After a final appeal was considered on full briefs and argument, the Court of Appeals for the Fourth Circuit affirmed the dismissal on May 27, 1980. Like the District Court, it saw the issue of tuition reimbursement, either for the 1976-77 school year or the entire period Elaine attended the private school, as the sole issue for decision. App. A at 4a. Like the District Court, the Fourth Circuit found that the County had afforded Elaine special education training from the time of her entry into the public school in 1969, and that the Stemples voiced no formal objection to her placement before removing her from public school in May, 1976. App. A at 2a; App. B at 8a.

The Fourth Circuit did not, however, reach any of the issues decided adversely to Petitioners by the District Court. Affirming the lower court, the appellate court held that the Stemples could not obtain reimbursement because their unilateral placement of the child in the Leary School violated the requirement of § 615(e)(3) of the EAHCA which:

> creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangement be made. App. A at 5a.

While the Court noted that the duty would not be "totally" enforceable by the State,[9] it held that the Stemples, who violated this duty, could not obtain tuition reimbursement. App. A at 5a.

[9] In stating that the duty is not totally enforceable, the Court recognized the obvious fact that the duty does not actually prevent parents from moving their child from public to private school.

On August 18, 1980, a timely petition for rehearing was denied.[10] Petitioners now request this Court to review the Fourth Circuit's decision that the Stemples cannot obtain reimbursement for the tuition costs of the Leary School during the 1976-77 school year.

REASONS FOR DENYING CERTIORARI

In asking that this Court grant certiorari, Petitioners make a bald assertion that the Fourth Circuit's decision will "effectively abrogate the substantive and procedural rights of a great number of handicapped children that Congress otherwise granted in the law in question." Petition at 15.

They contend that the Fourth Circuit's application of § 615(e)(3) is contrary to statutory interpretation by other district courts and policy letters of the Bureau of Education for the Handicapped ("BEH"), and contrary to the plain meaning and intention of the provision.

As the discussion below indicates, these contentions are wholly without merit. Although the outcome of the case is important to the Stemples, as they have so far been denied financial remuneration, the decision of the Court of Appeals addresses and determines, quite correctly, only a very narrow issue. Moreover, the Fourth Circuit's decision is consistent with other case law and gives effect to both the words and purposes of the statute.

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[10] In the order denying rehearing, the Fourth Circuit modified its opinion in one respect. Setting forth the facts concerning Elaine's past special education placements, the court originally stated:

> From 1969 until May, 1976, she was afforded such training by the County in a manner satisfactory to her parents.

In the order, the court revised this as follows:

> From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection in her placement. App. B at 8a.

The change did not affect the decision of the issue which Petitioners are asking this Court to review.

I.

THE PETITION PRESENTS A VERY LIMITED ISSUE FOR REVIEW.

The Fourth Circuit's decision in this case responds to a request for a limited type of relief, given a highly specific set of facts, and rests on narrow grounds. The court ruled only that when parents, like the Stemples, violate the duty set forth in § 615(e)(3) to keep a child in his then current placement during the pendency of review proceedings, they lose any right to recover the tuition costs thereby incurred.

Section 615(e)(3) states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The Court held that this provision creates a duty on the part of parents who avail themselves of the hearing and review provisions of the Act to keep the child in the current educational assignment, App. A at 5a, and Petitioners do not challenge this holding. They agree that parents who remove a child from his or her public school placement without the agreement of school authorities after invoking review procedures have removed a child during the pendency of proceedings and may not seek reimbursement for private school tuition expenses thereby incurred. Petition at 24-25.

Petitioners' sole contention is that § 615(e)(3) is inapplicable in this case because the Stemples removed Elaine to private school *before* they invoked the administrative and appeal provisions of the Act, and, therefore, they did

not remove her during the pendency of proceedings within the meaning of the Act. In ruling against Petitioners on this point, the Fourth Circuit stated:

> We reject this contention. It places too restricted a reading on § 615(e)(3). We do not think that the application of § 615(e)(3) depends upon the fine distinction between whether proceedings under § 615 are initiated before or after the duty to preserve the status quo is breached. The duty, it seems to us, arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child and continues until a decision not to contest it is reached or, if a contest ensues, until that contest is finally determined. App. A at 6a.

The only question which Petitioners present for review is the Fourth Circuit's holding as to the point in time at which the duty imposed by § 615(e)(3) arises.

II.

PETITIONERS HAVE FAILED TO CITE ANY CASE INCONSISTENT WITH THE FOURTH CIRCUIT'S DECISION IN THIS CASE.

Petitioners assert that the decision of the lower court is inconsistent with interpretations of § 615(e)(3) by four federal district courts, as well as administrative decisions by the Bureau of Education for the Handicapped ("BEH"). However, an examination of the cases shows that the cited decisions address totally different issues, and differ factually from the present case in crucial aspects. *See Monahan v. State of Nebraska,* 491 F. Supp. 1074 (D. Neb. 1980), *appeal docketed,* No. 80-1436 (8th Cir. June 4, 1980); *Capello v. D.C. Board of Education,* 3 EHLR 551:500 (D.D.C. Jan. 23, 1980), 3 EHLR 551:190 (D.D.C. May 9, 1979) appeal dismissed, No. 80-1217 (D.C. Cir. June 11, 1980); *Frankel v. Commissioner of Education,* 480 F. Supp. 1156 (S.D.N.Y. 1979); *Howard S. v. Friendship Independent School District,* 454 F. Supp. 634 (S.D. Tex. 1978). Thus, the conflict with the case law from other

jurisdictions which Petitioners contend is created by the Fourth Circuit decision does not exist.

Petitioners cite *Monahan v. State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *appeal docketed*, No. 80-1436 (8th Cir. June 4, 1980), as having interpreted § 615(e)(3) in "precisely the manner that petitioner contends it should be and in stark contrast to the fourth circuit's construction." Petition at 35-36. This is misleading because it suggests that the court was construing § 615(e)(3) on the same issue as we have here; namely, whether parents can avoid § 615(e)(3) by removing the child from a placement which they wish to challenge before invoking the statutory procedures for challenging it.

In fact, in *Monahan*, the court was addressing a very different situation — one where there was no existing placement in which the child could remain during the proceedings. The procedure called for by § 615(e)(3) was inapplicable by the nature of the facts and could not supply the basis for the court's decision. Addressing the need to determine an interim placement, the court stated in dicta that a child's then current educational placement is normally determined as of the time when a complaint is filed. 491 F. Supp. at 1088-89. The court was in no way endorsing the right of parents to unilaterally create a new placement, other than the one naturally existing when a disagreement arises. The court emphasized that the preceding placement had terminated for reasons beyond the control of the school district or the parents.

The *Monahan* court found that plaintiffs were likely to prevail on their claim that the administrative hearing procedures mandated by the EAHCA were not available due to a conflict with state law. It is, therefore, the direct opposite of the present case where the Stemples in no way claim that procedures called for by the Act were not available to them.

The facts in this case are that the delay in utilizing procedures and the expenditure for tuition arose from Petitioners' own delay in seeking a hearing and not from the unavailability of proper procedures. As set forth above, Petitioners wanted to change the placement that had been decided upon and effected in January 1976. They chose to express their disagreement by unilaterally removing the child from the placement in May, 1976, rather than by seeking a hearing. When their request for tuition reimbursement was denied, they still did not seek a hearing on the issues for an additional year.

In *Stuart v. Nappi,* 443 F. Supp. 1235 (D. Conn. 1978), the public school sought to expel a handicapped high-school age child for disciplinary reasons. The parents of the child claimed that the school could not expel her without first affording procedures under the EAHCA, since she was handicapped, and the behavior problems leading to expulsion resulted from special education needs which were inadequately met by the school. Citing § 615(e)(3), the Court granted a preliminary injunction preventing the school from expelling the child during the proceedings. 443 F. Supp. at 1241. The court made it clear that a school cannot avoid its duty to maintain a handicapped child in his or her placement by characterizing the child's removal as a disciplinary measure.

Stuart v. Nappi shows clearly that a party will not be permitted to avoid the EAHCA procedures by unilaterally terminating the placement on some theory and then insisting that the new situation be the "current" one which must be recognized while proceedings under the Act take place.

Three other cases cited by Petitioners do not discuss § 615(e)(3) at all. In *Howard S. v. Friendship Independent School District,* 454 F. Supp. 634 (S.D. Texas 1978), the parents of a handicapped minor sought a preliminary

injunction under § 504 of the Rehabilitation Act, alleging that school authorities had not given him the due process procedures required by that statute. The court did not even find jurisdiction under the EAHCA. Rather, it held that plaintiffs had a private right of action under § 504 of the Rehabilitation Act of 1973 and granted their preliminary injunction because school authorities had failed to provide the handicapped child a proposed educational placement and had not allowed his parents to participate in the decision or invoke their due process hearing rights.

The plaintiffs in *Frankel v. Commissioner of Education,* 480 F. Supp. 1156 (S.D.N.Y. 1979), alleged that the Commissioner of Education of New York had failed to timely and properly classify the minor plaintiff as handicapped and provide him with an appropriate education. *Frankel* held that the EAHCA could be applied to claims which arose prior to its effective date but which were awaiting final agency action at that time. The legal question involved the consistency of New York State law with EAHCA requirements. Nowhere did that opinion discuss the statutory language of § 615(e)(3).

In *Capello v. D.C. Board of Education,* 3 EHLR 551:500 (D.D.C. Jan. 23, 1980), 3 EHLR 551:190 (D.D.C. May 9, 1979), appeal denied, No. 80-1217 (D.C. Cir. June 11, 1980), the parents of an emotionally disturbed boy removed him from a public-funded private school placement and placed him in another private, residential school after proceedings under the EAHCA had begun, rather than return him to a public school day placement as proposed by the public school system. After ruling on the merits that the private, not the public school, placement was appropriate, the court awarded tuition reimbursement retroactively for the period of the proceedings. Since this was done without comment, explanation, or mention of § 615(e)(3), it is difficult to view it as an endorsement of Petitioners' position. It would appear that the court simply failed to consider the effect of § 615(e)(3).

Petitioners also incorrectly state that the lower court's holding is "at odds" with policy developed by the federal Bureau of Education for the Handicapped ("BEH"). Petition at 36. The meaning of § 615(e)(3) is elucidated by policy letters of BEH attached to the Petition, and these letters support the interpretation of the Fourth Circuit. The text of the response dated March 14, 1979 to James T. Micklern states:

> You asked if a local school district is responsible for the cost of tuition, during a due process hearing on the appropriateness of that placement, when the parent has placed the child in a private school without prior agreement of the local school district. Parents may choose to send a child to a private school rather than take advantage of a free appropriate public education. If this happens, there is no requirement for the State or local education agency to bear the cost of the private school tuition. In this situation, the cost of tuition could not be considered the responsibility of the State or local educational agency under the provisions of the Part B regulations (121a.513) unless the public agency and the parents of the child agree. This agreement is unlikely in that the placement is the substance of the disagreement under consideration in the due process hearing. App. G at 45a.

That opinion letter goes on to respond that when a local school district has placed the child in a private school and a disagreement develops as to the continuation of the private placement, then the school district is under an obligation to continue the payment of tuition until the due process proceedings have been completed. In other words, the duty runs both ways. If a local school district has placed a child in a private school, that is the child's current educational placement, and the local school district cannot remove the child from such private school during the pendency of that proceeding. App. G at 45a-46a.

In another BEH policy letter, dated May 15, 1979, the following is concluded:

> 1. It is correct that under Section 121a.552 of the regulations, an LEA must annually determine a handicapped child's placement. However, this must be done through a reassessment of the child's Individualized Education Program (IEP) with the parents involved as required in Sections 121a.340-121a.349. A change in placement cannot be made unilaterally by the LEA.
>
> 2. If the parents and LEA cannot agree on the proper placement, the LEA may *propose* to change the existing placement, but not before it gives the parents the notice required under Sections 121a.504-121a.505.
>
> 3. The notice to the parents informs them of their procedural rights under the statute and regulations. The parents may initiate a hearing under Section 121a.506, and if they do not prevail at the hearing, may exercise their appeal rights under Section 121a.501-121a.511.
>
> 4. Section 121a.513 requires that the child's placement remain the same during these proceedings. Thus, the LEA does not have a right to arbitrarily change that placement without the parents' agreement. App. G at 47a (emphasis in original).

Again, BEH makes it clear that the duty to keep a child in his or her current educational placement begins as soon as school authorities make their decision as to the identification, evaluation and placement of that child.

The Stemples in this case seek to put the cart before the horse by treating the changed placement they desire as the current placement. All interpretations of the EAHCA support and uphold the orderly procedures which it provides to both parents and schools to deal with disagreements. These procedures are set at naught if either party can require a desired change to be treated as the current

situation, simply by proposing it and acting unilaterally to effectuate it.

III.

THE FOURTH CIRCUIT'S INTERPRETATION OF § 615(e)(3) GIVES EFFECT TO ITS PLAIN MEANING AND PROMOTES THE PURPOSES OF THE EAHCA.

A. *The Plain Meaning of the Statute*

As Petitioners recognize, the EAHCA sets forth procedural safeguards available to parents who wish to appeal the decision of an educational agency regarding the identification, evaluation or educational placement of their child. 20 U.S.C. § 1415(b)(1)(c). The statute requires an administrative hearing and an appeal for review by the state education agency, if the hearing is conducted by a local or intermediate educational unit. There must be an impartial decision maker, and the parties have the right to present oral and written evidence, confront and cross-examine witnesses, be represented by counsel, and have a written decision from the hearing officer. A party dissatisfied with the administrative decision may file an action in federal district court, where the court may hear additional evidence and is to reach a decision on the merits. 20 U.S.C. § 1415(b), (d), (e); 45 C.F.R. § 121a.509; Petition at 20-21.

While these review proceedings are being conducted, it is self-evident that an interim arrangement is needed for the child. Congress made a judgment that children should remain in their existing placement during this period, a decision which is embodied in § 615(e)(3). Petitioners are asking, in effect, that the Court rewrite the policy chosen by Congress without even alleging that Congress exceeded its power in making this choice.

The effect of § 615(e)(3) is succinctly expressed in *Monahan v. State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), a case cited by Petitioners. The Court stated:

> In essence, it [615(e)(3)] is like an automatic preliminary injunction which maintains the child's then current educational placement. However, unlike a preliminary injunction, the statute replaces "the Court's discretionary consideration of irreparable harm and likelihood of success on the merits with an absolute rule in favor of the status quo." . . . The court is therefore without the power to place a child in any provisional placement except for his then current educational placement. 491 F. Supp. at 1088 (citations omitted).

The Congressional mandate must be followed.

Petitioners do not directly dispute the Congressional choice. They concede that parents who remove children to a private school during the pendency of proceedings must pay the tuition. Petition at 24-25. Their contention is that they should be able to accomplish indirectly — by removing the child first and then bringing proceedings — what the statute prohibits them from doing directly. In essence, Petitioners are contending that parents may unilaterally create a different placement, and then say it is the "current" placement, which the educational authorities must finance during the proceedings. Such an interpretation would allow parents to sidestep the statute, and vitiate the effect of § 615(e)(3).

Justice Holmes once wrote, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 332, 339 (1929). The constant theme of the EAHCA is that basic decisions about the education of handicapped children should be made only after an opportunity for input by both the parents and the educational authorities. It contravenes this basic purpose to allow the Stemples to cast financial

burdens upon the educational authorities by first taking unilateral action and then invoking the hearing procedures. Given the statute as a whole, it is illogical to give the words the meaning for which Petitioners argue.

The natural meaning of "current placement" is the placement which has been in effect, not one which is unilaterally created in derogation of the statutory method for effectuating changes.

B. *Purpose and Intent of Statute.*

Finally, a large part of the Petitioners' argument is premised on a hypothetical posed by them, rather than the actual facts of the case. Petition at 39-48. On the basis of their hypothetical, Petitioners seek to raise the spectre of parents locked into a system from which they cannot escape and allude to schools rewarded for "intransigence" and unfairness to "poor parents."[11] Petition at 44, 48.

As stated above, this is not a case where the parents have alleged that the school failed to utilize proper procedures in deciding upon the child's placement. In a case such as the present one, where the only issue is disagreement about a properly-made placement, it is inappropriate to characterize one party's behavior as "intransigence". If disagreement is intransigence, then both parties are intransigent.

The contention that "[a]s soon as the public agency proposes some action with regard to identification, evaluation, or placement, the parents are locked into the school system and may not be able to escape for years," is

[11] Insofar as Petitioners create a hypothetical concerning "poor parents", they are addressing facts and issues which are not part of their case. Nowhere along the path of this appeal have the Stemples alleged that they are part of a poor class or that a decision adverse to them would affect poor people generally.

expressly contravened by the statutory provisions of the EAHCA and its regulations. Petition at 44; *see* 45 C.F.R. § 121a *et seq.*

The statute unequivocally provides that each educational placement is only for one school year. An educational agency which receives payments under the EAHCA must assure that it:

> will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually. . . . 20 U.S.C. § 1414(a)(5).

This duty on the part of the educational agency to review a child's educational placement once a year is repeated in the regulations at least twice. In the provisions dealing generally with placements, it is stated:

> Each public agency shall insure that:
>
> (a) Each handicapped child's educational placement:
>
> (1) Is determined at least annually. . . . 45 C.F.R. § 121a.552.

Again the regulations repeat:

> (d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year. 45 C.F.R. § 121a.343(d).

The comments accompanying this particular section of the regulations once more state: "The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP."[12] Thus,

[12] Maryland has even more stringent review requirements. The present State Board of Education Bylaw mandates that a

Petitioners' contentions that a child will be locked into an inappropriate placement for years on end while parents proceed through the administrative and judicial process has no basis in the law. Rather, the child's educational program will continue to be reviewed at least once a year and be responsive to the changes in both the child's educational needs and school programs. Indeed, the facts of the instant case concern just one school year (1976-77) as the Stemples and school authorities were able to reach agreement on a mutually satisfactory program which permitted Elaine to return to the public school system.

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county's "Admission, Review, and Dismissal Committee" shall review the progress of every child receiving special education services within 60 days after the initial placement. Bylaw 13.04.01.06.D.5.

CONCLUSION

The core weakness of Petitioners' request for review is that they treat this controversy as a hypothetical case, rather than facing up to the facts as they actually exist.

The Fourth Circuit decision addresses only the specific instance where parents have removed their child from the public school before seeking to invoke the available administrative procedures. It considers the effect of their action only as to a limited result; namely, forfeiting a right to reimbursement.

Petitioners have not alleged that the January 1976 placement, which would have continued but for their unilateral action, was improperly decided upon. Therefore, this is not a case that presents the issue of the application of § 615(e)(3) when the existing placement is improperly decided upon or is impossible to maintain by the very nature of the circumstances. Other decisions on such points are not in conflict with this case and, in fact, manifest the ability of courts to fashion appropriate relief in a manner consistent with § 615(e)(3).

Neither is this a case where Petitioners allege any reason why they could not have initiated the proceedings called for by the EAHCA, rather than acting unilaterally. Their own recitation of facts shows that Respondents accorded them all local and state level hearings to which they were entitled. Therefore, the construction of § 615(e)(3) in this case in no way addresses the issue of parents who allege they were denied the hearing rights guaranteed by the Act before they removed their child from the school.

The only procedural issues raised by Petitioners in this case involve allocation of the burden of proof and presentation of evidence at the hearing stage. Since the Stemples first asked for a hearing after removing the child, these

allegations, even if true, could not justify their violation of the duty imposed by § 615(e)(3).

The Fourth Circuit's application of § 615(e)(3) to the facts of this case is consistent with its plain meaning and promotes the Congressional intention, manifested throughout the EAHCA, that disagreements be resolved through an orderly hearing process in which both parties participate, rather than by unilateral action of either parents or school authorities.

For all of the reasons stated above, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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